

37 Am. Jur. 2d Fraud and Deceit § 137

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Fraud and Deceit

George Blum, J.D., John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Janice Holben, J.D., Karl Oakes, J.D. and Eric C. Surette, J.D.

IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

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West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

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[Remedies for fraud or misrepresentation as to heating or cooling cost of realty purchased](#), 32 A.L.R.4th 828

Trial Strategy

[Misrepresentation in Automobile Sales](#), 13 Am. Jur. Trials 253

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 7 to 64](#) (Complaint, petition, or declaration—Fraud—Miscellaneous factual circumstances and transactions)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 92 to 122](#) (Complaint, petition, or declaration—Fraud in sale of personal property)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 123 to 131](#) (Complaint—Fraud in securing sales of goods on credit)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 132 to 146](#) (Complaints, petitions, or declarations—Fraud in security transactions)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 149 to 156](#) (Complaint, petition, or declaration—Fraud in sale of real property)

As a general rule, subject to certain exceptions, fraud must relate to a present or preexisting fact and cannot be predicated on representations or statements that involve mere matters of futurity or things to be done or performed in the future.¹ Thus, mere promissory statements or unkept promises cannot be made the basis of fraud.² Subject to those limitations, the scope of matters as to which fraudulent misrepresentations may be made is vast. For instance, fraud has been predicated upon—

- representations to investors by the manager of a business regarding his employment history, investment track record, and his personal financial situation.³
- representations by the president of a successful bidder, to the effect that the bidder was a small business, made in order to obtain a procurement contract.⁴
- representations by an oil and gas lessee regarding its right to cross surface estate owners' property to reach certain wells.⁵
- a representation that a person has an oral agreement with another which would be unenforceable under the statute of frauds.⁶
- representations to a subcontractor by the owner that the owner has procured and holds a bond guaranteeing the payment by the general contractor of all obligations to the subcontractors.⁷
- a representation as to the annual cost of fuel oil to heat a building.⁸
- allegations by a minority shareholder of the corporation regarding the status of a majority shareholder.⁹
- the use by companies, which are without authority to do business in a state, of names which include the state's name.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Laptop consumer failed to allege that there were representations made to him by laptop manufacturer regarding laptop's battery life that would support a claim for a duty to disclose based on partial representation in consumer's action against manufacturer under the California Consumers Legal Remedies Act (CLRA) for fraudulent omission. [West's Ann.Cal.Civ.Code § 1770\(a\)\(5, 7, 9\)](#). [Herron v. Best Buy Co. Inc.](#), 924 F. Supp. 2d 1161 (E.D. Cal. 2013).

[END OF SUPPLEMENT]

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Footnotes

- 1 §§ 84, 85, 86.
- 2 §§ 87 to 89.
- 3 [Paron Capital Management, LLC v. Crombie](#), 2012 WL 2045857 (Del. Ch. 2012).
- 4 [Systems Engineering and Sec., Inc. v. Science & Engineering Associations, Inc.](#), 962 So. 2d 1089 (La. Ct. App. 4th Cir. 2007).
- 5 [Kysar v. BP America Production Co.](#), 2012-NMCA-036, 273 P.3d 867 (N.M. Ct. App. 2012).
- 6 [Slonemsky v. Zevin](#), 239 A.D. 404, 267 N.Y.S. 589 (1st Dep't 1933).
- 7 [Champion Const. & Engineering Co. v. Bush Terminal Bldgs. Co.](#), 275 A.D. 1055, 92 N.Y.S.2d 242 (2d Dep't 1949).
- 8 [Zeliff v. Sabatino](#), 27 N.J. Super. 13, 98 A.2d 679 (App. Div. 1953), judgment rev'd on other grounds, 15 N.J. 70, 104 A.2d 54 (1954).
- 9 [Tyler v. O'Neill](#), 994 F. Supp. 603 (E.D. Pa. 1998), [aff'd](#), 189 F.3d 465 (3d Cir. 1999) (applying Pennsylvania law).
- 10 [State v. Saksniit](#), 69 Misc. 2d 554, 332 N.Y.S.2d 343 (Sup 1972).

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 138. Health, physical condition, or medical treatment

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West's Key Number Digest

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[Medical malpractice: liability based on misrepresentation of the nature and hazards of treatment, 42 A.L.R.4th 543](#)

[Modern status of rules as to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 A.L.R.4th 686](#)

Trial Strategy

[Unnecessary Surgery—Hysterectomy, 40 Am. Jur. Proof of Facts 3d 1](#)

False statements as to one's own health may be the basis of an action in fraud, and a representation that one is in good health when at the time a person knows he or she is suffering from a medical disorder will support an action in fraud.¹

A cause of action is recognized for the intentional or negligent communication of a venereal disease under either a general prima facie tort theory or fraud, deceit, and misrepresentation.² One court has stated that a person who knows that he or she has

acquired immune deficiency syndrome (AIDS) and misrepresents or conceals this knowledge from a sexual partner who then contracts AIDS as a result of unprotected sex should be liable for injuries sustained by his or her partner.³

Representations by third parties other than a physician about one person's health to another person may, under appropriate circumstances, form the basis of an action for fraud, but not if the person to whom the representation is made is unjustified in relying on those representations.⁴

The rules relating to false representations by physicians⁵ apply as well to statements by an employer's claim agent for the purpose of procuring a release⁶ and to false statements as to the nature of the injury whereby a settlement is procured, made by the agent of the person responsible for the injury.⁷

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Footnotes

- 1 [Cohen v. Kahn](#), 263 A.D. 728, 30 N.Y.S.2d 875 (2d Dep't 1941).
- 2 [Doe v. Roe](#), 157 Misc. 2d 690, 598 N.Y.S.2d 678 (J. Ct. 1993).
- 3 [J.B. v. Bohonovsky](#), 835 F. Supp. 796, 28 Fed. R. Serv. 3d 468 (D.N.J. 1993).
- 4 [Doe v. Dilling](#), 228 Ill. 2d 324, 320 Ill. Dec. 807, 888 N.E.2d 24 (2008) (plaintiff's claim that the parents of plaintiff's fiancé had misrepresented to her that the fiancé suffered from heavy-metal poisoning and Lyme disease, when the fiancé had allegedly been diagnosed with AIDS, and that plaintiff reasonably relied on those representations in delaying HIV testing).
- 5 § 139.
- 6 [Scheer v. Rockne Motors Corporation](#), 68 F.2d 942 (C.C.A. 2d Cir. 1934); [Graham v. Atchison, T. & S.F. Ry. Co.](#), 176 F.2d 819 (9th Cir. 1949); [Duncan v. Texas Employers' Ins. Ass'n](#), 105 S.W.2d 403 (Tex. Civ. App. San Antonio 1937), writ dismissed.
As to false representations by physicians, generally, see § 139.
- 7 [Scheer v. Rockne Motors Corporation](#), 68 F.2d 942 (C.C.A. 2d Cir. 1934).

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 139. Health, physical condition, or medical treatment—Statements by physicians and hospitals

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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[Liability of Hospice in Tort, in Contract, or Pursuant to Statute, for Maltreatment or Mistreatment of Patient, 95 A.L.R.6th 479](#)

[Liability of Hospice in Tort, in Contract, or Pursuant to Statute, for Maltreatment or Mistreatment of Patient, 95 A.L.R.6th 479](#)

[Medical malpractice: liability based on misrepresentation of the nature and hazards of treatment, 42 A.L.R.4th 543](#)

[Modern status of rules as to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 A.L.R.4th 686](#)

Trial Strategy

[Unnecessary Surgery—Hysterectomy, 40 Am. Jur. Proof of Facts 3d 1](#)

Whether fraud may be based on statements by a physician to an injured person as to the duration of the injured person's injuries generally depends on whether such statements are intended or understood to be mere expressions of opinion upon which the

person to whom they are made has no right to rely, or whether it was intended that they should be received, and whether they were received, as statements of fact.¹ A physician has a duty not to defraud a patient by intentionally misrepresenting the number of required treatments although this duty does not arise by virtue of the physician's specialized expertise or status as professional.² However, a physician's representations as to the expected result of an operation does not support a claim of fraud, absent evidence that the physician did not intend to accomplish the exact result the physician stated.³

An action for fraud may be stated where a physician misrepresents the results of surgery performed by the physician.⁴ Where a patient has a cause of action against a physician for negligence or malpractice and is deceived by intentional and knowing lies and fraud of the physician to the extent that the patient, in reliance on the fraudulent concealment by the physician, does not bring an action for malpractice within the period of the applicable statute of limitations, the patient may maintain an action for fraud against the physician, not on account of the original negligence or malpractice, but on account of the fraud of the physician that deceived the patient with the consequence that the time bar ran against the original action.⁵ It has been held in this regard that in order to have a separate cause of action for fraud based upon a physician's concealment of the physician's own malpractice, the medical malpractice plaintiff must show that the personal injuries caused by the fraud were different from those caused by the malpractice.⁶

Where a physician knowingly and intentionally represents that the physician can administer safely a substance that in fact can be administered only under restrictions and controls of a state or federal authority, and the physician administers that substance without a requisite permit and without informing the patient of the restrictions and dangers, the patient can maintain an action for fraud, as well as malpractice.⁷ Similarly, an individual treated by a person engaged in the unlicensed practice of dentistry may base a cause of action for fraud on such person's material false representations or concealment of a material existing fact.⁸ However, there can be no action for fraud against a hospital or physicians in the absence of a material misrepresentation of fact.⁹

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Footnotes

- 1 [Tulsa City Lines v. Mains](#), 107 F.2d 377 (C.C.A. 10th Cir. 1939); [Conklin v. Missouri Pac. R. Co.](#), 331 Mo. 734, 55 S.W.2d 306 (1932).
- 2 [Boggs v. Bosley Medical Institute, Inc.](#), 228 Ga. App. 598, 492 S.E.2d 264 (1997).
- 3 [Stone v. Foster](#), 106 Cal. App. 3d 334, 164 Cal. Rptr. 901 (3d Dist. 1980).
- 4 [Nutt v. Carson](#), 1959 OK 76, 340 P.2d 260 (Okla. 1959).
- 5 [Robinson v. Shah](#), 23 Kan. App. 2d 812, 936 P.2d 784 (1997).
- 6 [Harkin v. Culleton](#), 156 A.D.2d 19, 554 N.Y.S.2d 478 (1st Dep't 1990).
- 7 [Nelson v. Gaunt](#), 125 Cal. App. 3d 623, 178 Cal. Rptr. 167 (1st Dist. 1981).
- 8 [Adames v. Velasquez](#), 19 Misc. 3d 881, 855 N.Y.S.2d 343 (Sup 2008).
- 9 [Parham v. Florida Health Sciences Center, Inc.](#), 35 So. 3d 920 (Fla. 2d DCA 2010), review dismissed, 38 So. 3d 771 (Fla. 2010).

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G. Representations and Statements as to Particular Matters

1. In General

§ 140. Marriage, generally

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["Wrongful adoption" causes of action against adoption agencies where children have or develop mental or physical problems that are misrepresented or not disclosed to adoptive parents, 74 A.L.R.5th 1](#)

[Sexual partner's tort liability to other partner for fraudulent misrepresentation regarding sterility or use of birth control resulting in pregnancy, 2 A.L.R.5th 301](#)

A promise to marry made by one who knows that a lawful marriage is not possible because a prior marriage remains undissolved is a fraudulent promise.¹ One putative spouse can maintain a cause of action for fraud against the other for allegedly concealing his or her marital status at the time of their purported marriage.² It has been said in this regard that a statute barring claims for damages for breach of a promise to marry does not bar a claim for fraud merely because the fraudulent misrepresentation involves an intention to marry.³ However, where a woman knows that a man who has promised to marry her is already married, and the woman cannot by reason of public policy maintain a contract action for the defendant's breach of the promise to marry, the woman cannot sue in tort for fraud based on the promise to marry.⁴

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Footnotes

- 1 [In re Marriage of Buckley](#), 133 Cal. App. 3d 927, 184 Cal. Rptr. 290 (1st Dist. 1982); [Thorpe v. Collins](#), 245 Ga. 77, 263 S.E.2d 115 (1980).
- 2 [Holcomb v. Kincaid](#), 406 So. 2d 650 (La. Ct. App. 2d Cir. 1981), writ denied, 410 So. 2d 1136 (La. 1982), reconsideration not considered, 410 So. 2d 1148 (La. 1982) and reconsideration not considered, 412 So. 2d 991 (La. 1982).
- 3 [Turner v. Shavers](#), 96 Ohio App. 3d 769, 645 N.E.2d 1324 (10th Dist. Franklin County 1994).
- 4 [Thorpe v. Collins](#), 245 Ga. 77, 263 S.E.2d 115 (1980).

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G. Representations and Statements as to Particular Matters

1. In General

§ 141. Conception, birth control, and adoption

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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West's Key Number Digest, [Fraud](#) , 27, 28

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[Sexual partner's tort liability to other partner for fraudulent misrepresentation regarding sterility or use of birth control resulting in pregnancy, 2 A.L.R.5th 301](#)

A father is not permitted to maintain a misrepresentation claim against a mother even if she intentionally misrepresents her ability to conceive.¹ Public policy precludes tort actions to recover compensatory or punitive damages in connection with representations concerning birth control made before or during sexual relationships between consenting adults where the alleged wrong results in the birth of a normal, healthy child.² Similarly, public policy precludes a father, who is married to a woman other than the mother at the time of a child's conception, from maintaining an action against the mother for intentional misrepresentation, based on assertions that the father relied on the mother's assurances that she had taken adequate contraceptive measures.³ Tort liability cannot apply to the choice, however motivated, of whether to conceive or bear a child, and although a defendant may deliberately misrepresent his intentions to a plaintiff in order to persuade her to have an abortion, their procreative decisions are so intensely private that courts will not intervene.⁴

Adoptive parents may recover for an adoption agency's material misrepresentations of fact about a child's history prior to adoption.⁵ However, an action for wrongful adoption may not lie where the information provided is sufficient to predict any future health or emotional problems.⁶

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Footnotes

- 1 [Moorman v. Walker](#), 54 Wash. App. 461, 773 P.2d 887 (Div. 1 1989).
- 2 [C.A.M. v. R.A.W.](#), 237 N.J. Super. 532, 568 A.2d 556, 2 A.L.R.5th 1043 (App. Div. 1990).
A man voluntarily cohabiting with a woman cannot maintain a cause of action for fraud against a woman falsely claiming to practice birth control, when the woman became pregnant and delivered a child. [Jose F. v. Pat M.](#), 154 Misc. 2d 883, 586 N.Y.S.2d 734 (Sup 1992).
- 3 [Welzenbach v. Powers](#), 139 N.H. 688, 660 A.2d 1133 (1995).
- 4 [Perry v. Atkinson](#), 195 Cal. App. 3d 14, 240 Cal. Rptr. 402 (4th Dist. 1987).
- 5 [Mohr v. Com.](#), 421 Mass. 147, 653 N.E.2d 1104, 74 A.L.R.5th 693 (1995); [Burr v. Board of County Com'rs of Stark County](#), 23 Ohio St. 3d 69, 491 N.E.2d 1101, 56 A.L.R.4th 357 (1986); [Gibbs v. Ernst](#), 538 Pa. 193, 647 A.2d 882 (1994).
- 6 [Richard P. v. Vista Del Mar Child Care Service](#), 106 Cal. App. 3d 860, 165 Cal. Rptr. 370 (2d Dist. 1980).

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G. Representations and Statements as to Particular Matters

1. In General

§ 142. Employment

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West's Key Number Digest, [Fraud](#)  [27](#), [28](#)

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[Employer's liability, under state law, for fraud or misrepresentation inducing employee to take early retirement, 14 A.L.R.5th 537](#)

[Employer's misrepresentation as to prospect, or duration of, employment as actionable fraud, 24 A.L.R.3d 1412](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 28](#) (Complaint, petition, or declaration—For damages—Misrepresentation in soliciting prospective employees)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 29](#) (Complaint, petition, or declaration—For damages—False promise of employment)

An employee states a cause of action for fraud against an employer by alleging that the employee relies to his or her detriment on misinformation supplied by the employer.¹ This rule has been applied with respect to false representations concerning—

— the necessity that an employee on disability leave immediately return to work.²

— the length of employment.³

— the employer's willingness to pay hourly production workers for all time compensable under the Fair Labor Standards Act.⁴ On the other hand, the courts have dismissed fraud claims brought by employees where the employer did not make any actionable misrepresentation⁵ or where the employer's statements did not justify a subsequent action taken by the employee and thus did not support the claim for fraud.⁶

In the context of preemployment discussions, a general statement that a company's executives enjoy a stable and secure tenure is neither an actionable misrepresentation nor one upon which an employee can justifiably rely.⁷ A representation to a potential employee that the applicant can expect to earn a certain amount per year is insufficient to support a fraud claim where the employee understands that the income figure is based on sales and is not an absolute guarantee.⁸ Similarly, a former employee cannot recover for fraudulent misrepresentation for statements as to the employee's future employment status made in connection with the signing of a separation agreement and release where the employee fails to show that the employer promised the employee anything other than consulting services, and it continued to utilize the employee in that capacity.⁹

The general rule that promissory statements do not generally support an action for fraud¹⁰ is followed with respect to promises of employment¹¹ although there are exceptions with regards to this type of promise.¹² It has been held that liability can not be premised on promises of a job for life with yearly income at a certain level.¹³ Similarly, promises as to the management of a plaintiff's pension plan involve promises of future performance and thus do not give rise to liability for tortious misrepresentation.¹⁴ However, promises by an educational institution of employment upon graduation have been treated as actionable.¹⁵

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Footnotes

- 1 [Freedman v. Pearlman](#), 271 A.D.2d 301, 706 N.Y.S.2d 405 (1st Dep't 2000) (misrepresentations regarding income).
- 2 [Pugh v. Kaiser Aluminum & Chemical Sales, Inc.](#), 369 So. 2d 796 (Ala. 1979).
- 3 [Finch v. Brenda Raceway Corp.](#), 22 Cal. App. 4th 547, 27 Cal. Rptr. 2d 531 (1st Dist. 1994).
- 4 [Anderson v. Sara Lee Corp.](#), 508 F.3d 181 (4th Cir. 2007) (applying North Carolina law).
- 5 [Davis v. Dawson, Inc.](#), 15 F. Supp. 2d 64 (D. Mass. 1998).
- 6 [Glasgow v. Sherwin-Williams Co.](#), 901 F. Supp. 1185 (N.D. Miss. 1995), *aff'd*, 146 F.3d 867 (5th Cir. 1998); [Hayes v. Cleveland Pneumatic Co.](#), 92 Ohio App. 3d 36, 634 N.E.2d 228 (8th Dist. Cuyahoga County 1993).
- 7 [Whelan v. CareerCom Corp.](#), 711 F. Supp. 198 (M.D. Pa. 1989) (applying Pennsylvania law).
- 8 [Wilson v. Popp Yarn Corp.](#), 680 F. Supp. 208 (W.D. N.C. 1988); [Penzell v. Taylor](#), 219 Ill. App. 3d 680, 162 Ill. Dec. 142, 579 N.E.2d 956 (1st Dist. 1991) (particularly where the statement was further conditioned on the executive's best efforts).
- 9 [Horton v. Telxon Corp.](#), 99 Ohio Misc. 2d 83, 716 N.E.2d 786 (C.P. 1999).
- 10 As to false representations by physicians, generally, see § 139.
- 11 [Scullin v. Newman](#), 127 Ark. 227, 191 S.W. 922 (1917); [Hudson v. Venture Industries, Inc.](#), 147 Ga. App. 31, 248 S.E.2d 9 (1978), judgment *aff'd*, 243 Ga. 116, 252 S.E.2d 606 (1979).
- 12 [Lewis v. Finetex, Inc.](#), 488 F. Supp. 12 (D.S.C. 1977) (oral promise to hire for 18 months); [Payne v. Scholnick](#), 257 A.D. 923, 12 N.Y.S.2d 242 (4th Dep't 1939) (inducing plaintiff to leave his employment

and enter the defendant's on the assurance that the latter was going to stay in business, whereas he intended to sell out as soon as possible); [Mid-West Chevrolet Corp. v. Noah, 1935 OK 665, 173 Okla. 198, 48 P.2d 283 \(1935\)](#) (automobile dealer's deliberate misrepresentation to a truck purchaser that he would be given certain work with the truck).

13 [Barrett v. Independent Order of Foresters, 625 F.2d 73 \(5th Cir. 1980\)](#) (applying Georgia law).

14 [Stoler v. Metropolitan Life Ins. Co., 287 So. 2d 694 \(Fla. 3d DCA 1974\)](#).

15 [Schwitters v. Des Moines Commercial College, 199 Iowa 1058, 203 N.W. 265 \(1925\)](#) (promise that a commercial school student could complete the course and obtain a position in a certain number of weeks).

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1. In General

§ 143. Insurance

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West's Key Number Digest

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Trial Strategy

[Actions on Life Insurance Policies](#), 12 Am. Jur. Trials 549

An action in tort may be based upon a misrepresentation that insurance coverage has been effected when no policy or binder has been issued, especially where monthly premiums have been collected and retained on an insurance policy found not to have existed.¹ The act of accepting premiums constitutes a representation by an insurer that a policy is in full force and effect, and such a representation, when made without the corresponding intent to pay the proceeds in the event of a claim and coupled with reliance by the insured, constitutes willful fraud.²

Allegations that an insurer had actual knowledge that the life insurance policies it sold insureds violated existing tax law when sold, contrary to the insurer's written and oral representations, sufficiently allege misrepresentation of a material fact, as required to state a fraud claim.³

On the other hand, a title insurer is not liable in fraud to an insured purchaser for failing to include coverage for mechanics' liens in an owner's policy where there is no obligation to provide the owner's a policy covering mechanics' liens; there is no misrepresentation about what the policy excludes, either intentionally, recklessly, or otherwise; and the purchasers never express

a desire for a policy that does not exclude mechanics' liens.⁴ Moreover, an automobile insurer has no duty independent of the insurance policy to inform the insured of benefits to which he or she might be entitled, and thus, the insurer's failure to disclose does not amount to negligence or silent fraud, where the insured does not claim that the insurer made any specific misrepresentations, and there is no indication that the insurer provided partial, misleading information.⁵ Similarly, an insured's action against a homeowner's insurer under a theory of apparent authority, based on the alleged misrepresentations of an insurance agency with regard to the existence of flood coverage under the policy, is barred by the "duty to read" and "imputed knowledge" doctrines where the alleged misrepresentations were made by the agency to the insureds rather than to the insurer, and the insureds possessed the policy, which directly conflicted with the alleged misrepresentations, well before the loss occurred.⁶

CUMULATIVE SUPPLEMENT

Cases:

Insured, whose premium for long-term care policy increased over 76% after expiration of policy's ten-year rate guarantee rider, did not sufficiently allege that insurer had duty to disclose that it was going to raise future rates far in excess of 20%, and, thus, failed to state claim for fraudulent omissions under Illinois law, since fact that insured's highest level of education was high school and that she had no knowledge related to long-term care insurance did not create any special relationship of trust and confidence, and insurer's statement that it "may" impose rate increase meant that insurer had right to change rates, rather than any half-truth concerning possibility that insurer would change rates. [Toulon v. Continental Casualty Company](#), 877 F.3d 725 (7th Cir. 2017).

Under New York law, to establish a fiduciary duty, as required for negligent misrepresentation claim, an insured must plead some extraordinary circumstance, such as efforts by an insurer to gain the insured's trust or confidence. [Paraco Gas Corp. v. Travelers Cas. and Sur. Co. of America](#), 51 F. Supp. 3d 379 (S.D. N.Y. 2014).

Automobile repair shop failed to adequately allege that insurers had a special relationship with the shop imposing a duty on them to impart correct information to the plaintiff, that the insurers imparted any information to the shop, or that the shop relied on any such information, and thus shop failed to state cause of action for negligent misrepresentation in connection with insurers' alleged unlawful efforts to "steer" insureds with claims for damage to their commercial vehicles away from shop. [Pesce Bros., Inc. v. Cover Me Ins. Agency of NJ, Inc.](#), 144 A.D.3d 1120, 43 N.Y.S.3d 85 (2d Dep't 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Young v. Carrollton Federal Sav. & Loan Ass'n](#), 159 Ga. App. 836, 285 S.E.2d 264 (1981).
- 2 [Intercontinental Life Ins. Co. v. Lindblom](#), 598 So. 2d 886 (Ala. 1992).
- 3 [Zarella v. Pacific Life Ins. Co.](#), 809 F. Supp. 2d 1357 (S.D. Fla. 2011) (applying Florida law).
- 4 [Clements v. Mississippi Valley Title Ins. Co.](#), 612 So. 2d 1172 (Ala. 1992).
- 5 [Dugan v. State Farm Mut. Auto. Ins. Co.](#), 845 F. Supp. 2d 803 (E.D. Mich. 2012) (applying Michigan law).
- 6 [Mladineo v. Schmidt](#), 52 So. 3d 1154 (Miss. 2010).

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 144. Insurance—Fraud by insured or third party

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Trial Strategy

[Actions on Life Insurance Policies](#), 12 Am. Jur. Trials 549

A bank, operating as a premium finance agency, is liable to an insurer, under a theory of negligent misrepresentation, for incorrectly notifying the insurer that a policy has been cancelled where the bank knows that the statement of cancellation is required by the insurer for a serious purpose; the bank knows that the insurer will rely on the notice of cancellation and will be damaged by its reliance if the notice is either inaccurate or ineffective; and the bank, in assuming the burden of administering the policy, also assumed a correlative duty of accurately informing the insurer of its status.¹

Fraud has also been predicated on a physician's false representations to an insurer made in medical reports and billings submitted to the insurer by the physician on behalf of the insureds.²

In addition, a patient asserts fraud where a physician represents that a form is being signed to determine if there is insurance coverage when in fact the form is submitted to obtain payment³

Footnotes

- 1 [Home Mut. Ins. Co. v. Broadway Bank and Trust Co.](#), 100 Misc. 2d 228, 417 N.Y.S.2d 856 (Sup 1979), judgment aff'd, 76 A.D.2d 24, 429 N.Y.S.2d 948 (4th Dep't 1980), order aff'd, 53 N.Y.2d 568, 444 N.Y.S.2d 436, 428 N.E.2d 842, 26 A.L.R.4th 337 (1981).
- 2 [State Farm Fire and Cas. Co. v. Huynh](#), 92 Wash. App. 454, 962 P.2d 854 (Div. 1 1998).
- 3 [Thomas v. Halstead](#), 605 So. 2d 1181 (Ala. 1992) (dentist).

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1. In General

§ 145. Representations or promises as to improvements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Fraud may be established by proof that a purchaser of land, acting as a person of ordinary prudence, has been induced to enter into a contract to buy land by a representation of the vendor, known by the latter to be false, that an improvement has been made or is in existence in the neighborhood of the land at the time of the representation.¹ The fraudulent character of a material misrepresentation of a past or existing fact, made by a vendor and relied on by a purchaser to the purchaser's damage, is not altered by the circumstance that the fact misrepresented is preparatory to an improvement to be made in the future.²

A statement by a vendor of the vendor's intention to make improvements on property adjacent to that sold, if a mere promise or expression of opinion as to the future, and made in good faith, is not fraudulent and gives the purchaser no right to rescind merely because such intention or promise is not carried out.³ However, representations of intention to improve real property where no such intention exists are fraudulent,⁴ and therefore, if it appears that the vendor has no intention of making the improvement, a representation by the vendor that the vendor intends to make an improvement in the neighborhood of the land sold will constitute fraud as against a purchaser who, as a person of ordinary prudence, relies on the representation and because of a reliance on the misrepresentations suffers damage.⁵ Thus, false representations by one disposing of land of an intention to make improvements that will benefit the property disposed of are generally regarded as ground for rescinding the contract⁶ and a good defense to a suit for its specific performance.⁷

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Footnotes

- 1 Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 P. 175, 27 A.L.R. 337 (1922); Roberts v. James, 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912).
Adjacent landowners who sold a lot to the plaintiffs and represented to them that the cottage obstructing the view of the ocean would be removed were guilty of fraud when the cottage was moved to an adjacent lot and continued to block the plaintiffs' view. *Malerba v. Warren*, 108 Misc. 2d 785, 438 N.Y.S.2d 936 (Sup 1981), judgment modified on other grounds, 96 A.D.2d 529, 464 N.Y.S.2d 835 (2d Dep't 1983).
- 2 Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 P. 175, 27 A.L.R. 337 (1922); Roberts v. James, 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912).
- 3 Mid-Continent Life Ins. Co. v. Pendleton, 202 S.W. 769 (Tex. Civ. App. San Antonio 1918); Stewart v. Larkin, 74 Wash. 681, 134 P. 186 (1913).
As to statements as to future events, generally, see §§ 84, 85, 86.
As to promises made with intention not to perform, see §§ 94 to 100.
- 4 Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 P. 175, 27 A.L.R. 337 (1922).
- 5 Roberts v. James, 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912).
- 6 Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 P. 175, 27 A.L.R. 337 (1922); Rodgers v. Johnson, 47 S.D. 131, 196 N.W. 295 (1923).
- 7 Roberts v. James, 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912); Mid-Continent Life Ins. Co. v. Pendleton, 202 S.W. 769 (Tex. Civ. App. San Antonio 1918).
As to fraud as defeating specific performance, generally, see Am. Jur. 2d, Specific Performance §§ 63 to 68.

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1. In General

§ 146. Representations or promises as to improvements—By vendee or transferee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

If a purchaser, to induce a vendor to make a sale, promises to make certain improvements upon the land or improvements in the neighborhood that would enhance the value of other land of the vendor or that would otherwise benefit the vendor, when the purchaser has no intention of doing so, the vendor may rescind the transaction.¹ However, a mere promise by the vendee in regard to improvements to be located on the property is not fraud unless the promise is a device to accomplish fraud.²

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Footnotes

- 1 [Braddy v. Elliott](#), 146 N.C. 578, 60 S.E. 507 (1908).
- 2 [Braddy v. Elliott](#), 146 N.C. 578, 60 S.E. 507 (1908); [Chicago, T. & M.C. Ry. Co. v. Titterington](#), 84 Tex. 218, 19 S.W. 472 (1892).

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1. In General

§ 147. Purpose for which property is acquired or intended use thereof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Trial Strategy

[Real-Estate Broker's Misrepresentation or Nondisclosure as to Condition or Value of Realty, 39 Am. Jur. Proof of Facts 3d 309](#)

A misstatement or misrepresentation made in the negotiations for the purchase of land as to the use that the purchaser intends to make of the land or the purpose for which the purchaser wants it does not necessarily constitute fraud,¹ especially where the use for a different purpose from that stated does not injuriously affect the vendor by reason of the vendor's ownership of other land in the vicinity.² A false statement or representation relating to the purpose for which the purchaser is buying the land or to the use that the purchaser intends to make of it is of no consequence unless it appears that the statement or representation made was material and that the vendor relied upon it and was induced to enter into the contract thereby.³ However, some courts hold that statements by a purchaser of, or by one similarly acquiring, land as to the use the purchaser intends to make of it are statements of existing facts, and not mere promises of what will be done in the future, and if false and known to be false by the purchaser will warrant the vendor in rescinding the contract of sale if relied on by the vendor to the vendor's damage as, for example, a statement by the purchaser that the purchaser intends to erect dwellings on the property when in fact the purchaser intends to erect a garage.⁴ Indeed, many courts take the position that fraud entitling the vendor to rescind may be found from the facts that the purchaser induced the vendor to sell by falsely representing the use for which the purchaser desired the land,

knowing that the sale would not be made if the vendor was aware of the purpose or use for which the purchaser wanted the land, particularly where such use of the land would injure the value of other land in the vicinity.⁵

No charge of fraud will lie where the intended use of property is stated in good faith, but the purchaser afterward changes his or her mind.⁶ The mere fact that the purpose of the purchaser is speculation, and that the purchaser intends to make a profit out of the transaction, does not constitute fraud or unfair dealing, for this is frequently the purpose of purchasing property.⁷

Conversely, statements by a vendor or the vendor's agent to the effect that property may be used for a specific purpose when in fact it cannot is evidence of fraud.⁸

CUMULATIVE SUPPLEMENT

Cases:

Under Florida law, defendant engaged in common-law fraud by engaging in scheme involving the unauthorized and unlawful sale of wireless service provider's prepaid airtime minutes; defendant knowingly made false statements to provider's employees in order to coerce them into adding free airtime to prearranged phone numbers, and provider's employees acted upon defendant's false statements and added free airtime minutes to certain phone numbers, which resulted in financial loss to provider. [TracFone Wireless, Inc. v. Adams](#), 98 F. Supp. 3d 1243 (S.D. Fla. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Stackpole v. Hancock](#), 40 Fla. 362, 24 So. 914 (1898).
- 2 [Parsons v. Detroit & M.R. Co.](#), 122 Mich. 462, 81 N.W. 343 (1899); [State v. Blize](#), 37 Or. 404, 61 P. 735 (1900).
- 3 [Lucas v. Long](#), 125 Md. 420, 94 A. 12 (1915); [Brown v. Honiss](#), 74 N.J.L. 501, 68 A. 150 (N.J. Ct. Err. & App. 1907).
- 4 [Adams v. Gillig](#), 199 N.Y. 314, 92 N.E. 670 (1910); [Whitcomb v. Moody](#), 49 S.W.2d 513 (Tex. Civ. App. Waco 1932), writ refused, (July 19, 1932).
- 5 [Brett v. Cooney](#), 75 Conn. 338, 53 A. 729 (1902); [Adams v. Gillig](#), 199 N.Y. 314, 92 N.E. 670 (1910).
- 6 [Bryan v. Louisville & N.R. Co.](#), 292 Mo. 535, 238 S.W. 484, 23 A.L.R. 537 (1921).
- 7 [Cummins v. Beavers](#), 103 Va. 230, 48 S.E. 891 (1904).
- 8 [Lepera v. Fuson](#), 83 Ohio App. 3d 17, 613 N.E.2d 1060 (1st Dist. Hamilton County 1992).

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1. In General

§ 148. Representations to contractor as to amount or character of work, materials, cost, or soil conditions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Misrepresentations with reference to matters affecting the amount or character of work to be performed under a contract, or the cost or expense of the performance thereof, may constitute the basis for rescission of the contract¹ or for an action for damages in fraud and deceit.² This rule would seem to be most frequently applicable to building and construction contracts.³ While indefinite statements, expressions of opinion, and conjectural views as to the amount of work or materials or the cost thereof are not actionable,⁴ statements purporting to be factual and based upon superior knowledge, information, and investigation with respect to the work or materials required may constitute the basis for an action in fraud.⁵ A gross underestimate of the amount of work required, even though advanced as approximate only, may be found to be a misrepresentation of fact.⁶

Fraud justifying rescission or damages may be based in a proper case on misrepresentations by an owner to a contractor with respect to conditions below the surface.⁷ The complaint is usually based on some inaccuracy or inadequacy in notation on plans, in specifications, in the advertisements for bids, in profile drawings, or in records of soundings or of borings.⁸ Although the statement of an opinion as to the existence of certain conditions is not an actionable representation of fact, where the statement may be taken as either one of opinion or one of fact, it is for the jury to decide whether the contractor was warranted in relying upon it as one of fact.⁹

Observation:

The line between the mere presentation of the results of point borings, and the representation of general conditions based on such borings, is crossed where an owner's engineers show profile maps, or notations on plans, purporting to give subsoil conditions in general, and a contractor, under certain circumstances, may get relief on the basis of such a representation where the contractor relied upon it to the contractor's injury.¹⁰

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Footnotes

- 1 [Prest v. Inhabitants of Town of Farmington](#), 117 Me. 348, 104 A. 521, 2 A.L.R. 1390 (1918); [Long v. Inhabitants of Athol](#), 196 Mass. 497, 82 N.E. 665 (1907).
- 2 [Busch v. Wilcox](#), 82 Mich. 315, 46 N.W. 940 (1890), *aff'd*, 82 Mich. 336, 47 N.W. 328 (1890); [Sell v. Mississippi River Logging Co.](#), 88 Wis. 581, 60 N.W. 1065 (1894).
- 3 [Am. Jur. 2d, Building and Construction Contracts](#) § 110.
- 4 [Ariss-Knapp Co. v. Sonoma County](#), 73 Cal. App. 262, 238 P. 752 (1st Dist. 1925).
- 5 [Board of Water Com'rs of City of New London v. Robbins & Potter](#), 82 Conn. 623, 74 A. 938 (1910).
- 6 [Long v. Inhabitants of Athol](#), 196 Mass. 497, 82 N.E. 665 (1907).
- 7 [Elkan v. Sebastian Bridge Dist.](#), 291 F. 532 (C.C.A. 8th Cir. 1923); [Arthur A. Johnson Corp. v. Com.](#), 318 Mass. 88, 60 N.E.2d 364 (1945).
- 8 [Elkan v. Sebastian Bridge Dist.](#), 291 F. 532 (C.C.A. 8th Cir. 1923); [Arthur A. Johnson Corp. v. Com.](#), 318 Mass. 88, 60 N.E.2d 364 (1945).
- 9 [McClung Const. Co. v. Muncy](#), 65 S.W.2d 786 (Tex. Civ. App. Amarillo 1933), *writ dismissed*.
- 10 [E. & F. Const. Co. v. Town of Stamford](#), 114 Conn. 250, 158 A. 551 (1932).

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G. Representations and Statements as to Particular Matters

1. In General

§ 149. Representations as to source or supply of, capacity to produce, or sales commitments regarding, articles

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Misrepresentations of a seller as to the source of an article and capacity to manufacture it are actionable.¹ Although representations as to supply, productive capacity, and sales commitments regarding articles may, when standing alone, relate to existing facts and be actionable,² where the uncommitted capacity and supply are represented to be adequate to provide the plaintiff with a specified quantity of an article every month, apparently for an unlimited period, the representations constitute predictions or expressions of future expectations, or in the alternative, statements promissory in nature insofar as they imply an engagement or intention to maintain for the plaintiff's benefit an uncommitted capacity and supply at the level specified and are therefore not actionable.³

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Footnotes

- ¹ [Tele King Corp. v. Abeles](#), 282 A.D. 755, 123 N.Y.S.2d 95 (1st Dep't 1953).
- ² [Channel Master Corp. v. Aluminum Limited Sales, Inc.](#), 2 A.D.2d 933, 156 N.Y.S.2d 585 (3d Dep't 1956).
A statement by a district manager of a tool manufacturer to distributors that the manager had been to the company warehouse and had seen the tools and that there were enough to fill 80% of all orders was sufficient to make out claim for deceit. [Nickerson v. Matco Tools Corp., Div. of Jacobs Mfg. Co.](#), 813 F.2d 529 (1st Cir. 1987).
A statement in a project owner's letter to a steel supplier offering to tender direct payments to the supplier upon delivery of the steel to a manufacturer which had contracted to fabricate components for a steel building was not a material misrepresentation required to support a fraudulent inducement claim under

Pennsylvania law; the letter did not misrepresent that the owner guaranteed to satisfy the supplier's invoices if the manufacturer failed to do so but was instead an administrative proposal to streamline payments. [EBC, Inc. v. Clark Bldg. Systems, Inc.](#), 618 F.3d 253, 77 Fed. R. Serv. 3d 421 (3d Cir. 2010) (applying Pennsylvania law).

3 [Channel Master Corp. v. Aluminum Limited Sales, Inc.](#), 2 A.D.2d 933, 156 N.Y.S.2d 585 (3d Dep't 1956).

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 150. Falsely attesting signature; attesting instrument without seeing it signed

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , [27](#), [28](#)

A.L.R. Library

[Civil liability of witness falsely attesting signature to document, 96 A.L.R.2d 1346](#)

[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Fraud may be predicated upon the attesting of a signature, knowing it to be false.¹ Moreover, one who attests an instrument without seeing it signed may be liable in fraud on the basis of an implied misrepresentation where the signature to the instrument is not genuine.² Thus, a person who falsely attests that a signature on a document has been made in the person's presence or acknowledged by the signer in the person's presence has been held liable to another who relies on the false attestation and suffers damage thereby.³ On the other hand, civil liability predicated upon the act of a witness in falsely attesting a signature to a document has been denied.⁴

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Footnotes

¹ [Mendenhall v. Stewart, 18 Ind. App. 262, 47 N.E. 943 \(1897\).](#)

- 2 McCray Refrigerator Co. v. Uramoto, 79 Nev. 294, 382 P.2d 600, 96 A.L.R.2d 1339 (1963).
3 McCray Refrigerator Co. v. Uramoto, 79 Nev. 294, 382 P.2d 600, 96 A.L.R.2d 1339 (1963).
4 Motor Credit Co. v. Tremper, 121 N.J.L. 91, 1 A.2d 301 (N.J. Sup. Ct. 1938) (complaint did not contain well pleaded charge of fraud).

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IV. False Representations

G. Representations and Statements as to Particular Matters

2. Title, Location, Quantity, and Quality of Property

a. Title, Ownership, and Encumbrances

(1) In General

§ 151. Expressions of opinion

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

A representation as to title to property may be, in part at least, an opinion,¹ and a vendor's opinion as to title, where it is based upon facts truthfully stated, does not constitute fraud.² Accordingly, where the facts affecting a title are fully known to both of the parties to a transfer of the title, a general expression of opinion by one of them as to the condition of the title cannot, as a general rule, be made the basis of a charge of fraud.³ Hence, the transactor cannot be held responsible where the transactor merely expresses an opinion as to the legal effect of known facts and muniments of title,⁴ as to the validity of the transactor's title,⁵ or as to the transactor's rights under an instrument.⁶ On the other hand, a statement by the representor that the representor has a good title and can make a good title to the land to the representee, while embodying a conclusion from the facts relative to the title, is in effect a representation that the facts that will constitute a good title exist, especially where the representee is ignorant of land titles.⁷ Also, a false representation that a trust deed is a first lien and that there are no prior mortgages or trust deeds is a representation of fact and not a mere opinion.⁸

There is authority that where a false representation as to title or encumbrances is knowingly made with intent to deceive, it does not avail as a defense that the statement was a mere opinion.⁹

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Footnotes

- 1 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889); Kathan v. Comstock, 140 Wis. 427, 122 N.W. 1044 (1909).
- 2 Kosak v. Mabb, 10 Ariz. App. 432, 459 P.2d 520 (Div. 1 1969).
- 3 Choate v. Hyde, 129 Cal. 580, 62 P. 118 (1900); Cooper v. Hunter, 8 Colo. App. 101, 44 P. 944 (1896).
- 4 Venable v. Bradbury, 111 Kan. 495, 207 P. 647 (1922).
- 5 Venable v. Bradbury, 111 Kan. 495, 207 P. 647 (1922).
- 6 Rheingans v. Smith, 161 Cal. 362, 119 P. 494 (1911) (time when option would expire).
- 7 Buchanan v. Burnett, 102 Tex. 492, 119 S.W. 1141 (1909); Kathan v. Comstock, 140 Wis. 427, 122 N.W. 1044 (1909).
- 8 Kehl v. Abram, 210 Ill. 218, 71 N.E. 347 (1904).
- 9 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889) (dictum); Nipper v. Griffin Mercantile Co., 31 Ga. App. 211, 120 S.E. 439 (1923).

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IV. False Representations

G. Representations and Statements as to Particular Matters

2. Title, Location, Quantity, and Quality of Property

a. Title, Ownership, and Encumbrances

(1) In General

§ 152. Transactions involving personalty

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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A misrepresentation as to the title or ownership of personal property may constitute actionable fraud.¹ Thus, false representations that the representor's property is owned by a third person are actionable.²

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Footnotes

- ¹ [General Motors Acceptance Corp. v. Fairway Dodge Sales, Inc.](#), 80 A.D.2d 740, 437 N.Y.S.2d 171 (4th Dep't 1981).
One selling a car to a dealer when knowing that the title was forged has been held liable to the dealer and a buyer of the car from the dealer for compensatory and punitive damages. [Oppenhuizen v. Wennersten](#), 2 Mich. App. 288, 139 N.W.2d 765 (1966).
- ² [Culbreath v. Investors Syndicate](#), 203 S.C. 213, 26 S.E.2d 809, 147 A.L.R. 1144 (1943).

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G. Representations and Statements as to Particular Matters

2. Title, Location, Quantity, and Quality of Property

a. Title, Ownership, and Encumbrances

(2) Transactions Involving Real Estate

§ 153. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 103](#) (Complaint, petition, or declaration—Misrepresentation in sale of automobile—Encumbrance on automobile)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 166](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to ownership in fee)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 167](#) (Complaint, petition, or declaration—Misrepresentation that premises free from encumbrances—Including cause of action for breach of covenant against encumbrances)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 168](#) (Complaint, petition, or declaration—For damages—Misrepresentation that premises free from encumbrances—Existence of easement at time of purchase)

The general rule is well settled that false statements or misrepresentations by a vendor as to the vendor's title, or the character of the vendor's title, to the real estate in question, when made as a fact, or without regard to its truth or falsity, for the purpose of inducing another to purchase the same, constitute actionable fraud where a sale is induced thereby in reliance thereon and injury results therefrom, and may form the basis either for an action in tort for damages or for rescission.¹ A charge of fraud may be

based on misrepresentations of and concerning the title of the vendor where they were known to the vendor to be false and were relied on by the purchaser² even though such representations relate to matters of public record.³ This rule is applicable to false statements as to the title to fixtures upon realty,⁴ or restrictions as to its use,⁵ and has been applied to a false representation by the representor that the representor has title to the property when in fact the representor has no title,⁶ that a corporation is an owner in fee simple when in fact the corporation is merely a contract purchaser,⁷ and that a representor is a owner in fee simple when in fact the representor holds only a life estate.⁸

False statements and misrepresentations as to the existence of liens and encumbrances on property, as to liens or encumbrances affecting the interest of the representor, or as to the amount of such liens or encumbrances are usually deemed to constitute actionable fraud⁹ even though the liens and encumbrances are matters of public record.¹⁰

A representation by the vendor in a contract for the sale of land or by the vendor's agent or representative as to title, to be actionable fraud, must be made as a matter of fact rather than of opinion, and a mere expression of opinion regarding the vendor's or grantor's title or ownership, when based on facts truthfully stated or equally within the knowledge of both parties, is not a fraud even though the opinion is not well founded.¹¹ However, if the vendor assumes to represent the vendor's title as good when the vendor knows it is bad, and the vendee is deceived thereby, the vendor cannot escape liability for deceit by claiming that the representation is only a matter of opinion.¹²

A person who signs an agreement to sell real property though the person is only one of two joint owners is not liable for fraud absent proof that the person made any misrepresentations to the prospective purchaser with respect to the person's status as a joint owner or as an agent of the other owner.¹³ Similarly, a commissioner at a foreclosure sale makes no misrepresentation, either express or implied, during a sale of a property so as to render the commissioner liable on the basis of fraud to the purchaser for damages sustained when the holder of an outstanding deed of trust forecloses on the property where the commissioner does not represent to the purchaser that the deed of trust is the only lien against the property, but rather, the commissioner notifies the purchaser that the property is being sold subject to that lien and any other unpaid deeds of trust.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Allegation made in complaint of purchaser of home, that seller and real estate agency knew that there was water infiltration and water damage in or about wallboard of home, satisfied requirement for pleading of ultimate facts, but not evidentiary facts, in purchaser's action alleging breach of contract, consumer fraud, fraudulent misrepresentation, and negligent misrepresentation, since pleading was sufficient to bring purchaser's claims within causes of action alleged. [Blevins v. Marcheschi, 2018 IL App \(2d\) 170340, 421 Ill. Dec. 825, 101 N.E.3d 807 \(App. Ct. 2d Dist. 2018\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [Meeks v. Garner, 93 Ala. 17, 8 So. 378 \(1890\); Debral Realty, Inc. v. DiChiara, 383 Mass. 559, 420 N.E.2d 343 \(1981\); Ehrman v. Feist, 1997 ND 180, 568 N.W.2d 747 \(N.D. 1997\); Davis v. Lee, 52 Wash. 330, 100 P. 752 \(1909\) \(want of title in vendor\).](#)

- 2 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889); Schechinger
v. Gault, 1913 OK 118, 35 Okla. 416, 130 P. 305 (1913); Gannon, Goulding & Thies v. Hausaman, 42 Okla.
41, 140 P. 407 (1914).
- 3 Schechinger v. Gault, 1913 OK 118, 35 Okla. 416, 130 P. 305 (1913).
As to the duty to examine the public records, see § 251.
- 4 O'Daniel v. Streeby, 77 Wash. 414, 137 P. 1025 (1914).
- 5 Williamson v. Clapper, 88 Cal. App. 2d 645, 199 P.2d 337 (2d Dist. 1948).
- 6 Bryant v. Bruner, 593 S.W.2d 358 (Tex. Civ. App. Texarkana 1979).
- 7 In re Van Quach, 187 B.R. 615 (Bankr. N.D. Ill. 1995).
- 8 Ehrman v. Feist, 1997 ND 180, 568 N.W.2d 747 (N.D. 1997).
- 9 Nipper v. Griffin Mercantile Co., 31 Ga. App. 211, 120 S.E. 439 (1923); Goody v. Maryland Casualty Co.,
53 Idaho 523, 25 P.2d 1045 (1933).
In an action in which purchasers of a house sought damages and rescission due to the fraudulent concealment
of the existence of an outstanding deed of trust and in which the defendants counterclaimed for the balance
and interest due on the promissory note, the defendants could not prevail on the basis of the contention that
the existence of the deed of trust was not a material fact because the purchasers did not understand real estate
transactions and would not have changed their position even if they were informed of the deed of trust, in
light of the fact that the applicable test was whether the fact concealed would have affected the conduct of
a reasonably prudent buyer. Osterberger v. Hites Const. Co., 599 S.W.2d 221 (Mo. Ct. App. E.D. 1980).
- 10 § 251.
- 11 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889); Buchanan
v. Burnett, 102 Tex. 492, 119 S.W. 1141 (1909).
- 12 Carr v. Sanger, 138 A.D. 32, 122 N.Y.S. 593 (2d Dep't 1910); Buchanan v. Burnett, 102 Tex. 492, 119 S.W.
1141 (1909).
- 13 Chan v. Bay Ridge Park Hill Realty Co., 213 A.D.2d 467, 623 N.Y.S.2d 896 (2d Dep't 1995).
- 14 Gibson v. Lambeth, 86 N.C. App. 264, 357 S.E.2d 404 (1987).

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37 Am. Jur. 2d Fraud and Deceit § 154

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§ 154. Easements, rights, privileges, and appurtenances

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 168](#) (Complaint, petition, or declaration—For damages—Misrepresentation that premises free from encumbrances—Existence of easement at time of purchase)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 172](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to zoning classifications—General form)

A purchaser of land may base a charge of fraud against the vendor on misrepresentations made by the vendor or the vendor's agent as to easements, rights, privileges, or appurtenances attached to the land sold, although the deed does not expressly include such incidents and was not intended to do so.¹ A vendor and broker's misrepresentation to a purchaser as to the zoning of a property is actionable fraud.² Fraud may also be based upon a misrepresentation by the vendor of land that it is not burdened by any easements.³

The sale of real property, subject to an easement of public record, does not have the taint of fraud by the failure of the vendor to disclose specifically an encumbrance where the vendor, in a written option to the vendee, agreed to convey title free from

encumbrances "except ... easements"⁴ The vendors of property make no false representation concerning the legal access to property where the legal access exists through an easement by implication or necessity even though no recorded easement permits access by the road.⁵

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Footnotes

- 1 [Connelly v. Merritt](#), 273 So. 2d 7 (Fla. 1st DCA 1973) (perpetual access to a lakefront); [Jupe v. City of Schertz](#), 604 S.W.2d 405 (Tex. Civ. App. San Antonio 1980), writ refused n.r.e., (Dec. 17, 1980) (misstatement of the grantor that a public road was merely a utility easement providing the city with access to water); [Gould v. James](#), 43 Wyo. 161, 299 P. 275 (1931).
- 2 [Barnes v. Lopez](#), 25 Ariz. App. 477, 544 P.2d 694 (Div. 2 1976).
A county industrial authority, in selling a purchaser a tract of land zoned for heavy manufacturing, did not do so with knowledge that the land was not suitable for that purpose, as necessary for the purchaser to establish a fraud claim. [Futch v. Lowndes County](#), 297 Ga. App. 308, 676 S.E.2d 892 (2009).
- 3 [Gilbey v. Cooper](#), 37 Ohio Misc. 119, 66 Ohio Op. 2d 366, 310 N.E.2d 268 (C.P. 1973).
- 4 [Balogh v. Sacks](#), 97 Ohio App. 17, 55 Ohio Op. 185, 123 N.E.2d 37 (9th Dist. Summit County 1954).
- 5 [Mostrong v. Jackson](#), 866 P.2d 573 (Utah Ct. App. 1993).

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§ 155. Taxes and assessments

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

The view has been taken that fraud may be predicated on misrepresentations by a vendor as to the amount of taxes or assessments on the property sold¹ even though the vendee could have ascertained the truth concerning them from an examination of the public records.² Similarly, false representations made by the rental agents of a shopping mall to a prospective tenant regarding the estimated costs of completing the mall, common area charges, and estimated taxes were opinions that could form the basis for an action for fraud where the lessee was justified in relying on the representations since only the defendants were in a position to know the information necessary to form an opinion regarding costs and taxes.³ There is, however, authority to the contrary.⁴

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Footnotes

- 1 [Crawford v. Armacost](#), 85 Wash. 622, 149 P. 31 (1915); [Woteshek v. Neumann](#), 151 Wis. 365, 138 N.W. 1000 (1912).
- 2 [§ 251](#).
- 3 [Magnaleasing, Inc. v. Staten Island Mall](#), 428 F. Supp. 1039, 23 Fed. R. Serv. 2d 1569 (S.D. N.Y. 1977), judgment aff'd, 563 F.2d 567 (2d Cir. 1977).
- 4 [Kalmans v. Powles](#), 121 Wash. 203, 209 P. 5, 29 A.L.R. 618 (1922).

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§ 156. Ownership by third person

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Trial Strategy

[Real-Estate Purchaser's Recovery of Damages in Tort for Fraudulent Misrepresentation of Quantity of Land Sold, 61 Am. Jur. Proof of Facts 3d 411](#)

Where one induces another through false and fraudulent representations to execute a contract for the purchase of real property assertedly owned by a third person, there is a cause of action in fraud for damages sustained where the third person has no right to convey the property.¹ False representations that the representor's personal property is owned by a third person are also actionable.²

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Footnotes

¹ [Fisher v. Heer, 259 A.D. 952, 20 N.Y.S.2d 147 \(3d Dep't 1940\).](#)

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§ 157. Certificate of occupancy

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

Trial Strategy

[Misrepresentation in Automobile Sales](#), 13 Am. Jur. Trials 253

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 91, 113](#) (Complaint, petition, or declaration—Misrepresentation as to validity of patent)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 96](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to ownership)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 103](#) (Complaint, petition, or declaration—Misrepresentation in sale of automobile—Encumbrance on automobile)

A claim of fraud may be based upon representations by the vendor of a building that the vendor has a certificate of occupancy for the building when in fact the vendor has no such certificate.¹

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Footnotes

¹ [Federal Brush Corp. v. A. Zerega's Sons, Inc., 149 N.Y.S.2d 374 \(City Ct. 1956\).](#)

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§ 158. Representations by purchaser or grantee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 187](#) (Complaint, petition, or declaration—For rescission—Fraud in procuring deed—Deed represented as being another type of instrument—Deed misrepresented as being lease)

There are many instances in which misrepresentations made by a purchaser as to the validity of the title of the vendor or the extent of the vendor's interest in the land, when taken in connection with the peculiar circumstances, have been held to constitute a fraud.¹ Thus, misrepresentations to the owner of real estate as to the extent of the owner's interest in the property, the owner being ignorant with reference thereto, and the purchaser having knowledge of the extent of the owner's interest, are actionable.² Even though a purchaser acts honestly or without an intention to deceive, a purchaser's making of a materially false statement as to the vendor's title may entitle the latter to avoid the transaction³ although, according to most courts, it is essential in an action at law for deceit to show that the defendant either knew that the statement that the defendant made was false or that the defendant made it under circumstances raising a presumption of knowledge.⁴

A mere expression of an opinion by the purchaser as to the state of the vendor's title to property will not usually amount to such a misrepresentation as will entitle the vendor to relief, and this is especially true where the opinion is based on a legal conclusion and the purchaser does not claim any legal or special knowledge of titles.⁵ Fraud may, however, be predicated upon the grantee's opinionative statements as to title when accompanied by false statements of underlying facts.⁶ Also, where a person having or professing to have a superior knowledge of the law obtains the property of another by a false statement as to the validity of the owner's title, this amounts to fraud in equity.⁷

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Footnotes

- 1 [Woodrow v. Riverside Greyhound Club](#), 192 Ark. 770, 94 S.W.2d 701 (1936); [Tewmey v. Tewmey's Assignee](#), 251 Ky. 489, 65 S.W.2d 479 (1933).
Open slander of title by one who becomes a secret purchaser is prima facie evidence of fraud. [Weitzell's Lessee v. Fry](#), 4 U.S. 218, 4 Dall. 218, 1 L. Ed. 807, 1800 WL 3176 (Pa. 1800).
- 2 [Seeger v. Odell](#), 18 Cal. 2d 409, 115 P.2d 977, 136 A.L.R. 1291 (1941).
- 3 [Kathan v. Comstock](#), 140 Wis. 427, 122 N.W. 1044 (1909).
- 4 §§ 119 to 123.
- 5 [Morse v. Duryea](#), 174 Ky. 234, 192 S.W. 477 (1917).
- 6 [Kathan v. Comstock](#), 140 Wis. 427, 122 N.W. 1044 (1909).
- 7 [White v. Harrigan](#), 1919 OK 352, 77 Okla. 123, 186 P. 224, 9 A.L.R. 1041 (1919); [Ward v. Baker](#), 135 S.W. 620 (Tex. Civ. App. 1911), writ dismissed.

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b. Location, Boundaries, or Identity

§ 159. Generally

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  [27](#), [28](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 161, 162](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to acreage and boundaries of real property)

The general principle is well settled that false statements or misrepresentations as to the location, boundaries, or identity of real property that is the subject of a transaction constitute actionable fraud¹ and will sustain an action of deceit² or constitute ground for rescinding the contract.³

Representations made by one who claims personal knowledge and is seeking to deal commercially cannot be considered mere matters of opinion,⁴ nor can representations that are made positively, with the intent that they be relied upon.⁵ Whenever the owner of a property undertakes to point out to the prospective purchaser boundaries of the property the owner expects to sell, the misrepresentations are matters of fact, not opinion, and in indicating boundaries, the owner must do so accurately, and a failure to do so will amount to a false representation for which the owner will be liable even though the owner acted under an honest mistake and without an intent to deceive.⁶

Footnotes

- 1 [Canady v. Mann](#), 107 N.C. App. 252, 419 S.E.2d 597 (1992).
An owner of real property is under a duty to inform himself or herself of the true boundaries of land the owner seeks to sell, and an owner who breaches this duty and misrepresents the true boundaries in the sale of property commits constructive fraud. [Stone v. Farnell](#), 239 F.2d 750 (9th Cir. 1956).
- 2 [Andrus v. St. Louis Smelting & Refining Co.](#), 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889) (wherein the rule is stated that false and fraudulent representations as to the location and condition of land may be ground for damages); [Warren v. Hugo Scherer Estate](#), 272 Mich. 254, 261 N.W. 319 (1935); [Camicia v. Iafollo](#), 89 W. Va. 422, 109 S.E. 335 (1921).
- 3 [Warren v. Hugo Scherer Estate](#), 272 Mich. 254, 261 N.W. 319 (1935).
- 4 [Warren v. Hugo Scherer Estate](#), 272 Mich. 254, 261 N.W. 319 (1935).
- 5 [Davis v. Lee](#), 52 Wash. 330, 100 P. 752 (1909).
- 6 [Murphree v. Rawlings](#), 3 Wash. App. 880, 479 P.2d 139 (Div. 2 1970).

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§ 160. Sales; representations by vendor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  [27](#), [28](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 161, 162](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to acreage and boundaries of real property)

As a general rule, a charge of fraud may be based upon misrepresentations by the vendor of land as to the location, boundaries, or identity of the land, and such misrepresentations may support an action of deceit or constitute ground for rescinding the contract.¹ This rule has been applied where a vendor either intentionally or, assuming to act on personal knowledge, falsely points out certain lines as the true boundaries² where a vendor who claims personal knowledge misrepresents the location³ or misrepresents the location positively with the intent that the representations shall be relied on,⁴ and where a vendor falsely represents that certain land is included in the tract disposed of.⁵

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Footnotes

- 1 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889); Lanning
- 2 v. Sprague, 71 Idaho 138, 227 P.2d 347 (1951); Blanke v. Miller, 364 Mo. 797, 268 S.W.2d 809 (1954).
- 3 Lanning v. Sprague, 71 Idaho 138, 227 P.2d 347 (1951).
- 4 Warren v. Hugo Scherer Estate, 272 Mich. 254, 261 N.W. 319 (1935).
- 5 Davis v. Lee, 52 Wash. 330, 100 P. 752 (1909).
- Arnold v. Campbell, 265 Ky. 485, 97 S.W.2d 32 (1936).

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c. Quantity; Acreage

§ 161. Generally

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A.L.R. Library

[Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 A.L.R.2d 660](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 98](#) (Complaint, petition, or declaration—For damages—Delivery of lesser quantity than agreed)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 161, 162](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to acreage and boundaries of real property)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 164](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to location, extent, and value of timber on land sold)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 165](#) (Complaint, petition, or declaration—Misrepresentations as amount of land in tract and flow of water on tract)

Generally, where one dealing commercially with property either overestimates or underestimates the quantity of the subject matter of the transaction and is in a position to know or form a reasonably accurate estimate thereof, fraud may be predicated upon a false representation as to quantity resulting from such estimate if the representee is not in as favorable a position as the representor and relies upon such estimate.¹ Hence, false representations as to the quantity of goods,² the area or acreage of land or buildings,³ or the quantity of timber trees growing on land⁴ may be made the basis of a charge of fraud.

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Footnotes

- 1 [Stewart v. Wyoming Cattle-Ranche Co.](#), 128 U.S. 383, 9 S. Ct. 101, 32 L. Ed. 439 (1888); [Lanning v. Sprague](#), 71 Idaho 138, 227 P.2d 347 (1951); [Marshall v. Keaveny](#), 38 N.C. App. 644, 248 S.E.2d 750 (1978); [Heise v. Pilot Rock Lumber Co.](#), 222 Or. 78, 352 P.2d 1072 (1960).
- 2 [Lanning v. Sprague](#), 71 Idaho 138, 227 P.2d 347 (1951).
- 3 [§ 162](#).
- 4 [Heise v. Pilot Rock Lumber Co.](#), 222 Or. 78, 352 P.2d 1072 (1960).

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c. Quantity; Acreage

§ 162. Area of real estate

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[Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 A.L.R.2d 660](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 161, 162](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to acreage and boundaries of real property)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 165](#) (Complaint, petition, or declaration—Misrepresentations as amount of land in tract and flow of water on tract)

The general principle is widely recognized that a misrepresentation by the vendor of land as to the quantity of the land may be the basis of a charge of fraud where the vendor is in a position to know or form a reasonably accurate estimate of the actual quantity

and the vendee is not as favorably situated as the vendor and relies upon the misrepresentation.¹ False statements made by vendors as to the area of the land that was the subject of a sale are frequently regarded by the courts as having been intended to be accepted by the vendee as statements of fact of which the vendor has knowledge, and not expressions of opinion, and therefore to constitute fraud or deceit and to render the vendor liable in tort for the resulting damages to the vendee.² However, where a mere estimate of the quantity is given, a charge of fraud has been held not maintainable, unless the representor intended to deceive the representee.³ Moreover, mere expressions of opinion by the representor as to the area of land or the number of acres that the tract contains cannot be made the basis of a charge of fraud,⁴ at least where the opinion is honestly entertained and there is no fraudulent intent.⁵ Also, in some jurisdictions, in the sale of real estate, the principle of caveat emptor applies to conditions open to observation and inspection, such as the location of lot lines and the amount of acreage in a lot that was part of a recorded plat on public file, and a casual verbal representation regarding a lot line and acreage do not constitute actionable fraud.⁶

Purchasers state a cause of action for fraud in connection with the purchase of a condominium unit when they allege that the defendant made a material misrepresentation about the floor dimensions of a purchased unit, purposefully inducing the purchasers to rely on it, and that the purchasers bought and prepared to move into the unit.⁷

A vendor's use of the expression "more or less," "approximately," "about," or some similar term in stating the area of the property conveyed does not prevent the vendor's being liable in fraud unless the variance between the actual area and that claimed is only slight.⁸ The mere fact that the deficiency is very large is some evidence of fraud.⁹

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Footnotes

- 1 [Owen v. Schwartz](#), 177 F.2d 641, 14 A.L.R.2d 1337 (D.C. Cir. 1949); [Fisher v. Zimmer](#), 286 A.D. 1129, 146 N.Y.S.2d 170 (3d Dep't 1955), judgment aff'd, 1 N.Y.2d 721, 151 N.Y.S.2d 932, 134 N.E.2d 681 (1956).
That the real property in question was of unusual size or irregular shape has been noted in a number of cases in which the vendor of such property was held liable for misrepresentation as to its area, which might be deemed to indicate that such size or shape was a factor in the court's determination. [Loehr v. Manning](#), 44 Wash. 2d 908, 272 P.2d 133 (1954).
- 2 [Clark v. Haggard](#), 141 Conn. 668, 109 A.2d 358, 54 A.L.R.2d 655 (1954); [Basnett v. Besett](#), 371 So. 2d 705 (Fla. 2d DCA 1979), decision approved, 389 So. 2d 995 (Fla. 1980).
- 3 [Boddy v. Henry](#), 113 Iowa 462, 85 N.W. 771 (1901).
- 4 [Fillegar v. Walker](#), 54 Ohio App. 262, 7 Ohio Op. 416, 23 Ohio L. Abs. 20, 6 N.E.2d 1010 (1st Dist. Hamilton County 1936).
- 5 [Lawson v. Floyd](#), 124 U.S. 108, 8 S. Ct. 409, 31 L. Ed. 347 (1888); [Graber v. Mayem](#), 426 F.2d 789 (9th Cir. 1970); [Stinson v. Adams](#), 376 So. 2d 1108 (Ala. Civ. App. 1979); [Fillegar v. Walker](#), 54 Ohio App. 262, 7 Ohio Op. 416, 23 Ohio L. Abs. 20, 6 N.E.2d 1010 (1st Dist. Hamilton County 1936).
As to opinions as basis for action for misrepresentation, generally, see § 65.
- 6 [Florek v. Thomas](#), 12 Ohio Op. 3d 70 (Mun. Ct. 1979).
- 7 [Bhandari v. Ismael Leyva Architects, P.C.](#), 84 A.D.3d 607, 923 N.Y.S.2d 484 (1st Dep't 2011).
- 8 [Brodsky v. Hull](#), 196 Md. 509, 77 A.2d 156 (1950); [Jeffreys v. Weekly](#), 81 Or. 140, 158 P. 522 (1916); [Weinstein v. Sprecher](#), 2 Wash. App. 325, 467 P.2d 890 (Div. 1 1970).
- 9 [Boddy v. Henry](#), 113 Iowa 462, 85 N.W. 771 (1901); [Jeffreys v. Weekly](#), 81 Or. 140, 158 P. 522 (1916).

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IV. False Representations

G. Representations and Statements as to Particular Matters

2. Title, Location, Quantity, and Quality of Property

c. Quantity; Acreage

§ 163. Exchanges

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

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[Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 A.L.R.2d 660](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 193 to 196](#) (Fraud in exchange transactions)

In exchange transactions, false representations as to the quantity of the property offered in exchange may be the basis of a charge of fraud.¹ If the various elements of a cause of action for fraud and deceit are established, a party to a contract for the exchange of lands may be held liable in tort for misrepresentation by the party or the party's agent in overstating the area of the land exchanged.²

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Footnotes

- 1 [Williams v. Hume](#), 83 Ind. App. 608, 149 N.E. 355 (1925); [Jacks v. Manning](#), 297 S.W. 588 (Tex. Civ. App. Austin 1927).
Statements made by one of the parties in a cattle trade as to the number of head of cattle, which are nothing more than a guess or estimate and must have been so regarded by the other party, do not form the basis of any assertion of fraud. [Sorrells v. Clifford](#), 23 Ariz. 448, 204 P. 1013 (1922).
- 2 [Summers v. Martin](#), 77 Idaho 469, 295 P.2d 265 (1956); [Jacks v. Manning](#), 297 S.W. 588 (Tex. Civ. App. Austin 1927); [Black v. Thompson](#), 110 Wash. 379, 188 P. 393 (1920).

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37 Am. Jur. 2d Fraud and Deceit § 170

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IV. False Representations

G. Representations and Statements as to Particular Matters

3. Value, Cost, and Income of Property

a. Value

§ 170. General rule of nonliability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 136](#) (Complaint, petition, or declaration—For damages—Purchase of stock induced by misrepresentations as to character, extent, and value of property owned by corporation)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 138](#) (Complaint, petition, or declaration—For rescission—Purchase of stock induced by representations that company owned valuable patent—Product not patentable)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 219](#) (Instruction to jury—Expression of opinion not a representation—Opinion as to value)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 220](#) (Instruction to jury—No right to rely on opinion as to value of property)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 221](#) (Instruction to jury—Commendatory trade talk as mere expressions of opinion)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 222](#) (Instruction to jury—Expressions of opinion or affirmations of fact—Statements by one having expert knowledge)

As a general rule, statements as to the value of property, though false, are neither grounds for affirmative relief nor good as a defense.¹ Although there are exceptions,² representations of value made by a person dealing with property are ordinarily

to be regarded only as mere expressions of opinion or commendatory trade statements, and when such is the case, do not constitute fraud or the basis thereof,³ at least in the absence of a confidential relationship.⁴ The same characterization resulting in nonliability is ordinarily accorded to representations that property is worth a certain sum⁵ or as to the amount for which it may be sold.⁶ Thus, it is generally held that a false statement by the vendor of land as to its value cannot form the basis of a charge of fraud.⁷ Likewise, as a general rule, a false affirmation of value by a seller of personalty cannot be made the basis of a charge of fraud, as it is the buyer's own folly to credit an assertion of that nature.⁸

There is authority to the effect that where a representation is that the property is worth a certain sum, the suit is not maintainable notwithstanding that the representee avers and offers to prove that the representor does not in fact entertain that opinion of the value and expresses it with intent to deceive.⁹ On the other hand, it is held that such representations are actionable when known to the speaker to be untrue, if made with the intention of misleading the representee and if the representee does in fact rely on them and is misled, to the representee's injury.¹⁰

Whether a misrepresentation as to value is merely an expression of opinion, or an affirmation of fact or intentional representation to be relied upon, is generally regarded as a question of fact to be determined by the trier of facts.¹¹

Observation:

The general rule that fraud cannot be predicated on representations as to value is based on the fact that value is largely a matter of judgment and estimation, about which people may differ,¹² and it is therefore unlikely that any statement as to value was material in the sense that it was an inducing cause of a transaction.¹³ Such representations can rarely have induced a party to enter into a contract without negligence on that party's part.¹⁴

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Footnotes

- 1 [Lehigh Zinc & Iron Co. v. Bamford](#), 150 U.S. 665, 14 S. Ct. 219, 37 L. Ed. 1215 (1893) (holding that a general assertion that property is valuable, although untrue, is not deceit); [Herrill v. Rugg](#), 114 Cal. App. 492, 300 P. 140 (1st Dist. 1931).
 - 2 [§ 171](#).
 - 3 [Southern Development Co. of Nevada v. Silva](#), 125 U.S. 247, 8 S. Ct. 881, 31 L. Ed. 678 (1888); [Shepherd v. Woodson](#), 328 S.W.2d 1 (Mo. 1959); [Transport Ins. Co. v. Faircloth](#), 898 S.W.2d 269 (Tex. 1995); [Tetreault v. Campbell](#), 115 Vt. 369, 61 A.2d 591 (1948); [Hood v. Cline](#), 35 Wash. 2d 192, 212 P.2d 110 (1949).
 - 4 [§ 171](#).
 - 5 [Herrill v. Rugg](#), 114 Cal. App. 492, 300 P. 140 (1st Dist. 1931).
 - 6 [Baxter v. Davis](#), 252 Ky. 525, 67 S.W.2d 678 (1934).
 - 7 [Page Inv. Co. v. Staley](#), 105 Ariz. 562, 468 P.2d 589 (1970); [Henning v. Kyle](#), 190 Va. 247, 56 S.E.2d 67 (1949).
- As to representations of market value or market price, see [§ 172](#).

- 8 Stumpf v. Lawrence, 4 Cal. App. 2d 373, 40 P.2d 920 (3d Dist. 1935); Zeiting v. Steinberg, 277 S.W. 953 (Mo. Ct. App. 1925); Rothermel v. Phillips, 292 Pa. 371, 141 A. 241, 61 A.L.R. 489 (1928).
- 9 Baxter v. Davis, 252 Ky. 525, 67 S.W.2d 678 (1934).
- 10 Rothermel v. Phillips, 292 Pa. 371, 141 A. 241, 61 A.L.R. 489 (1928).
- 11 Vah Dah Dunshee v. Boadway, 119 Cal. App. 678, 7 P.2d 325 (3d Dist. 1932); Fourth Nat. Bank v. Webb, 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930).
- 12 Southern Development Co. of Nevada v. Silva, 125 U.S. 247, 8 S. Ct. 881, 31 L. Ed. 678 (1888); Herrill v. Rugg, 114 Cal. App. 492, 300 P. 140 (1st Dist. 1931); Burke v. King, 1936 OK 263, 176 Okla. 625, 56 P.2d 1185 (1936).
- 13 Gordon v. Butler, 105 U.S. 553, 26 L. Ed. 1166, 1881 WL 19779 (1881); Herrill v. Rugg, 114 Cal. App. 492, 300 P. 140 (1st Dist. 1931); Burke v. King, 1936 OK 263, 176 Okla. 625, 56 P.2d 1185 (1936).
- 14 Lynch v. Dunn's Adm'r, 208 Ky. 15, 270 S.W. 468 (1925); Burke v. King, 1936 OK 263, 176 Okla. 625, 56 P.2d 1185 (1936).

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G. Representations and Statements as to Particular Matters

3. Value, Cost, and Income of Property

a. Value

§ 171. Exceptions to general rule

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

A.L.R. Library

[Real-estate broker's or agent's misrepresentation to, or failure to inform, vendor regarding value of vendor's real property, 33 A.L.R.4th 944](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 30](#) (Complaint, petition, or declaration—Rendition of services fraudulently induced—Misrepresentation as to value of stock agreed to be taken in payment of services)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 114](#) (Complaint, petition, or declaration—Misrepresentations as to value of patent)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 186](#) (Complaint, petition, or declaration—For rescission—Collusion between vendee and vendor's agent to defraud vendor—Misrepresentation of true value of land)

There are many exceptions to the general rule that statements of value are not a sufficient basis for a charge of fraud, such exceptions arising out of the special circumstances under which the representations are made.¹ It cannot be laid down as a matter of law that value is never a material fact.² For example, the general rule that such statements are not actionable applies only where the parties stand on an equal footing and have equal means of knowledge, with no relation of trust or confidence existing between them.³ Likewise, a statement of value may be of such a character, so made and intended, and so received, as to constitute fundamental misrepresentation,⁴ and if it is made as an assertion of fact, and with the purpose that it shall be so received, and it is so received, it may amount to a fraud.⁵ Moreover, a statement of value involving and coupled with a statement of a material fact is fraud.⁶

The general rule that assertions of value are not actionable does not apply where the representation comes from a third person not known to have any interest in magnifying the value of the property. Thus, where the value of certain property is stated by one who apparently has no object to gain, and no motive or intention to depart from the truth, and who thus throws the representee off guard, and exposes the representee to being misled, the speaker is liable in damages for the false statement.⁷

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Footnotes

- 1 [Kabatchnick v. Hanover-Elm Bldg. Corp.](#), 328 Mass. 341, 103 N.E.2d 692, 30 A.L.R.2d 918 (1952); [Shepherd v. Woodson](#), 328 S.W.2d 1 (Mo. 1959).
- 2 [Vah Dah Dunshee v. Boadway](#), 119 Cal. App. 678, 7 P.2d 325 (3d Dist. 1932); [Gould v. James](#), 43 Wyo. 161, 299 P. 275 (1931).
A complaint by first-time home buyers, stating that an appraisal for property one home buyer had purchased contained "several misrepresentations concerning the condition and qualities of the home, including, but not limited to: who owned the property, whether the property had municipal water, the type of basement and the status of repairs on the home," stated a cause of action for fraud against the appraisers as to such home buyer, since the buyer had sufficiently pleaded the elements of material misrepresentation of fact, scienter, justifiable reliance, and damages. [Flandera v. AFA America, Inc.](#), 78 A.D.3d 1639, 913 N.Y.S.2d 441 (4th Dep't 2010).
- 3 [Hiltbold v. Stern](#), 82 A.2d 123, 26 A.L.R.2d 852 (Mun. Ct. App. D.C. 1951); [Shepherd v. Woodson](#), 328 S.W.2d 1 (Mo. 1959).
The trial court's conclusion that a developer constructively defrauded subdivision lot purchasers when its builders represented that future homes in the subdivision would be of a size and value comparable to theirs was supported by the factual findings, including that the builders failed to advise residents of the actual minimum requirements of the subdivision's architectural standards or that the developer could change the standards at will, that there was a special relationship among the parties by virtue of the subdivision declaration, that the purchasers relied on the builders' representations when deciding to construct their homes on the lots, that their homes had a lesser value than they would have had if located amongst comparable homes, and that the purchasers' homes enhanced the developer's marketing of the remainder of the community as it was completed. [Yeager v. McManama](#), 874 N.E.2d 629 (Ind. Ct. App. 2007).
- 4 [Sunderhaus v. Perel & Lowenstein](#), 215 Tenn. 619, 388 S.W.2d 140 (1965); [Tetreault v. Campbell](#), 115 Vt. 369, 61 A.2d 591 (1948).
- 5 [Hiltbold v. Stern](#), 82 A.2d 123, 26 A.L.R.2d 852 (Mun. Ct. App. D.C. 1951); [Collier v. Nolan](#), 125 Vt. 82, 211 A.2d 265 (1965).
- 6 [Alio v. Saponaro](#), 133 A.D.2d 887, 520 N.Y.S.2d 245 (3d Dep't 1987); [Sunderhaus v. Perel & Lowenstein](#), 215 Tenn. 619, 388 S.W.2d 140 (1965).
- 7 [Samp v. Long](#), 50 S.D. 492, 210 N.W. 733 (1926).

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G. Representations and Statements as to Particular Matters

3. Value, Cost, and Income of Property

a. Value

§ 172. Market value or market price

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West's Key Number Digest

West's Key Number Digest, [Fraud](#) , [27](#), [28](#)

While different conclusions have been reached under varying fact situations, most of the courts support the proposition that representations of market price or market value are not necessarily mere representations of opinion, but are, or at least under some circumstances may be, representations of fact on which fraud may be predicated.¹ For instance, a representation that a certain kind of property, constantly sold, has a market at certain figures and that it readily sells at those figures, is not a statement of opinion, but one of fact, upon which fraud may be predicated.² Under this view, although intrinsic value may be the subject of opinion only, a statement as to the market value of a stock which has an ascertainable market value is a statement of a fact and not the mere expression of an opinion.³ Also, a complaint by vendors that their real estate brokers misrepresented to them the market value of their home, the lowest price at which their home would sell, and the length of time needed to sell the home, states a cause of action for fraud where the brokers' representations can be found to have been meant by the parties to be understood as statements of fact to be relied upon rather than as expressions of mere opinion to be accepted solely as such.⁴ Likewise, evidence supports a jury verdict in favor of a trust that invested in a cattle-raising venture and against the providers of feedlot services who induced the trust to make the investment where the feedlot providers misrepresented the market value and profitability of the cattle under the plan, including a claim that the cattle would sell for a certain price as of a certain futures-trading date, resulting in an operating loss and lost profits to the trust.⁵

Some cases, however, support the doctrine that representations as to market price or market value of stock or of other property, where the truth is readily obtainable by both parties, are ordinarily representations of opinion merely, which will not constitute a basis for fraud.⁶ Accordingly, a representation of the market value of a commodity is merely an opinion that cannot be made the basis of a recovery for fraud and deceit in the absence of a confidential relationship between the parties.⁷ The doctrine that

representations as to the market value of an article or commodity are mere expressions of opinion, and not statements of fact, is limited in its operation to familiar articles and commodities of commerce whose market value is easily ascertainable and does not apply to sales of articles or commodities whose market value is difficult of determination, especially when such articles or commodities are offered for sale by a vendor who is familiar with their true worth and real market value, to the vendee, who is entirely ignorant thereof, and who buys in reliance on the vendor's positive statements concerning the market value.⁸

Fraud may be predicated on false representations of market value and may constitute a defense to an action for the purchase price of property so misrepresented⁹ or a defense to an action on notes given for the purchase price.¹⁰ In some instances, however, such statements have been held to be opinionative and not sufficient to form the basis for a defense on the ground of fraud.¹¹

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Footnotes

- 1 [Fourth Nat. Bank v. Webb](#), 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930) (market value of corporate stock); [Sunderhaus v. Perel & Lowenstein](#), 215 Tenn. 619, 388 S.W.2d 140 (1965); [Gray v. Wikstrom Motors](#), 14 Wash. 2d 448, 128 P.2d 490 (1942).
- 2 [Gray v. Wikstrom Motors](#), 14 Wash. 2d 448, 128 P.2d 490 (1942) (standard selling price of a certain model of car).
- 3 [Fourth Nat. Bank v. Webb](#), 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930).
- 4 [Duhl v. Nash Realty Inc.](#), 102 Ill. App. 3d 483, 57 Ill. Dec. 904, 429 N.E.2d 1267, 33 A.L.R.4th 928 (1st Dist. 1981).
- 5 [Hedley Feedlot, Inc. v. Weatherly Trust](#), 855 S.W.2d 826 (Tex. App. Amarillo 1993), writ denied, (Feb. 2, 1994).
- 6 [Lilienthal v. Suffolk Brewing Co.](#), 154 Mass. 185, 28 N.E. 151 (1891) (market value of hops).
- 7 [Fossier v. Morgan](#), 474 S.W.2d 801 (Tex. Civ. App. Houston 1st Dist. 1971).
- 8 [Fourth Nat. Bank v. Webb](#), 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930); [Griesa v. Thomas](#), 99 Kan. 335, 161 P. 670 (1916).
- 9 [Hetland v. Bilstad](#), 140 Iowa 411, 118 N.W. 422 (1908).
- 10 [Fourth Nat. Bank v. Webb](#), 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930).
- 11 [Kincaid v. Price](#), 82 Ark. 20, 100 S.W. 76 (1907) (land); [Lilienthal v. Suffolk Brewing Co.](#), 154 Mass. 185, 28 N.E. 151 (1891) (notes).

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a. Value

§ 173. Representations by purchaser

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West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

As a general rule, in the absence of special circumstances that make it incumbent upon a purchaser to speak the truth and to disclose facts in the purchaser's own knowledge and unknown to the vendor, statements which the purchaser makes during the negotiations as to the value of the land cannot ordinarily be made the basis of a charge of fraud.¹ A vendor should know or ascertain the value of the vendor's own property, and if the vendor is so indiscreet as to place reliance upon the statement of a prospective purchaser, without finding out the truth personally, the vendor should be left to make the best of a bad bargain.² However, the fact that the purchaser has special information regarding facts enhancing the ordinary value of land places the purchaser under a legal obligation to do no act or make any representation calculated to mislead the owner into the belief that there was no special condition affecting the value.³

In the absence of waiver or estoppel, a vendor or seller who has been induced by false representations of a vendee or buyer to grant or sell the property on terms less favorable than the vendor would otherwise have demanded may maintain an action sounding in tort against such vendee or buyer for the damages resulting from such fraud.⁴ In many of the cases, the vendee or buyer, by reason of confidential relationships or otherwise, has had greater knowledge than the vendor or seller of the value of the property in the purchase of which the fraud and deceit were committed.⁵ In other cases in which such statements have been held actionable as fraud, however, there was no such confidential relationship.⁶

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Footnotes

- 1 [James v. Anderson](#), 149 Va. 113, 140 S.E. 264, 56 A.L.R. 421 (1927).
- 2 [Stuart v. Dorow](#), 216 Mich. 591, 185 N.W. 662 (1921).
- 3 [Crompton v. Beedle](#), 83 Vt. 287, 75 A. 331 (1910).
- 4 [Cheraska v. Ohanasian](#), 259 Mass. 341, 156 N.E. 715, 52 A.L.R. 1149 (1927).
- 5 [McDonough v. Williams](#), 77 Ark. 261, 92 S.W. 783 (1905).
- 6 [Simon v. Goodyear Metallic Rubber Shoe Co.](#), 105 F. 573 (C.C.A. 6th Cir. 1900) (person induced to make hard contract, by false representations that a competing seller of the commodity had gone out of business); [Cheraska v. Ohanasian](#), 259 Mass. 341, 156 N.E. 715, 52 A.L.R. 1149 (1927) (vendor induced to sell for lower price by false representation that no broker had been involved in transaction, when in fact a broker had been sufficiently involved to render the vendor liable for brokerage commissions).

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§ 174. Exchange transactions

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West's Key Number Digest

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As a general rule, representations as to the value of properties involved in exchange transactions are ordinarily considered as mere expressions of opinion, or commendatory trade statements, and as such, do not constitute fraud or the basis thereof.¹ Where the parties to an exchange contract stand upon an equal footing, expressions of opinion as to the value of certain property will not usually be considered so material that misstatements will constitute fraud.² There are, however, circumstances under which representations as to value in exchange transactions are actionable.³ Thus, misrepresentations as to value in exchange transactions are fraudulent where the other party has not equal means of knowing the true value,⁴ where the other party is fraudulently induced to forbear making an examination or inquiry,⁵ or where there is a relation of trust and confidence between the parties.⁶ Also, false representations as to specific extrinsic matters which, if true, materially affect the value of the property which is the subject of an exchange are usually regarded by the courts as representations of fact, on which a charge of fraud may be based.⁷

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Footnotes

- ¹ [Batchelor v. Batchelor](#), 502 So. 2d 751 (Ala. 1987).
- ² [White v. Oregon Realty Exch. Inv. Co.](#), 114 Or. 636, 236 P. 269 (1925).
- ³ [Burgdorfer v. Thielemann](#), 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936); [Gould v. James](#), 43 Wyo. 161, 299 P. 275 (1931).

- 4 Vah Dah Dunshee v. Boadway, 119 Cal. App. 678, 7 P.2d 325 (3d Dist. 1932); Burgdorfer v. Thielemann, 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936).
- 5 Burgdorfer v. Thielemann, 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936); Gould v. James, 43 Wyo. 161, 299 P. 275 (1931).
- 6 Vah Dah Dunshee v. Boadway, 119 Cal. App. 678, 7 P.2d 325 (3d Dist. 1932).
- 7 Stumpf v. Lawrence, 4 Cal. App. 2d 373, 40 P.2d 920 (3d Dist. 1935); Pustelniak v. Vilimas, 352 Ill. 270, 185 N.E. 611 (1933).

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37 Am. Jur. 2d Fraud and Deceit § 175

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§ 175. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

As a general rule, false statements by one disposing of property commercially to a person negotiating for its acquisition, with reference to the cost thereof, are sufficient to authorize or sustain a charge of fraud if the statements are made to influence the transaction relating to the property and are relied upon by the representee to the representee's injury.¹ A vendor or the vendor's agent, dealing at arm's length with a purchaser, is guilty of fraud entitling the purchaser to relief where such vendor or agent misrepresents the price paid for the property, or the price someone else paid for it, and that statement is relied upon by the purchaser to the purchaser's detriment.² This rule has also been applied to such misrepresentations by one exchanging property.³

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Footnotes

- 1 [Essenburg v. Russell](#), 346 Mich. 319, 78 N.W.2d 136 (1956).
- 2 [Dunlap v. Peirce](#), 336 Ill. 178, 168 N.E. 277, 66 A.L.R. 181 (1929).
- 3 [Fenwick v. Sullivan](#), 102 Vt. 28, 145 A. 258 (1929).

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§ 176. Effect of special circumstances

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Even in jurisdictions in which a mere misrepresentation as to the cost of property does not of itself constitute actionable deceit, there may exist circumstances that in connection with the misrepresentation will constitute grounds for actionable deceit, such as where the parties do not stand on an equal footing,¹ where confidential relationships exist,² or where the representations amount to dishonest estimates, as where an architect deliberately misrepresents the cost of a building which is to be constructed.³ Moreover, whatever conflict there may be as to the fraudulent character of representations of cost generally, the courts sustain the doctrine that where, by the agreement, the cost to the transactor disposing of the subject matter thereof is taken as the criterion by which the instant price is to be determined, statements as to the cost are material and essential elements of the contract, and any misrepresentation or fraudulent practices with reference thereto, if relied upon by the representee, constitute actionable fraud,⁴ whether the price to be paid by the representee is based on the price paid by the disposing owner⁵ or by others,⁶ and especially where the parties contemplate future business relations to grow out of the sale.⁷

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Footnotes

- 1 [Beare v. Wright](#), 14 N.D. 26, 103 N.W. 632 (1905).
- 2 [Beare v. Wright](#), 14 N.D. 26, 103 N.W. 632 (1905).
- 3 [Lane v. Inhabitants of Town of Harmony](#), 112 Me. 25, 90 A. 546 (1914).
- 4 [Beare v. Wright](#), 14 N.D. 26, 103 N.W. 632 (1905); [Bergeron v. Miles](#), 88 Wis. 397, 60 N.W. 783 (1894).

"Invoice value" has a definite meaning, and a false statement as to it may be actionable where it was determinative of the price paid by the buyer. [Knopfler v. Flynn](#), 135 Minn. 333, 160 N.W. 860 (1917).

5 [Fellows v. Sapp](#), 45 Ga. App. 89, 163 S.E. 314 (1932); [Knopfler v. Flynn](#), 135 Minn. 333, 160 N.W. 860 (1917); [McBee v. Deussenberry](#), 99 W. Va. 176, 128 S.E. 378 (1925).

6 [Beare v. Wright](#), 14 N.D. 26, 103 N.W. 632 (1905).

7 [Kohl v. Taylor](#), 62 Wash. 678, 114 P. 874 (1911).

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§ 177. Representations as to price at which property has been sold or offered

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Misrepresentations by one seeking to dispose of property commercially as to the price for which the property had been sold or offered have frequently been held to be factual and material, and thus to afford a basis for fraud,¹ although the mere statement of an excessive asking price has been held not to constitute fraud.² Similarly, representations that bonds are selling at par, that there has not been a sale of them for less than a certain figure, and that the seller has borrowed a certain amount from the bank on the bonds, are representations of fact and, if false and made with intent to deceive, will sustain an action for damages for the fraud.³

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Footnotes

- ¹ [Dunlap v. Peirce](#), 336 Ill. 178, 168 N.E. 277, 66 A.L.R. 181 (1929).
- ² [MacKellar v. Thompson](#), 119 A.D. 36, 103 N.Y.S. 853 (2d Dep't 1907).
- ³ [Adams v. Collins](#), 196 Mass. 422, 82 N.E. 498 (1907).

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37 Am. Jur. 2d Fraud and Deceit § 178

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§ 178. Representations as to other offers

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

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[Misrepresentation by lessor, in negotiations for lease, as to offers of rental received from third persons, as actionable fraud, 30 A.L.R.2d 923](#)

A cause of action for fraud or deceit is recognized when a person falsely represents to another in a sales transaction that the person has been offered more for the property in another offer and the prospective purchaser relies on the misrepresentation.¹ It has been said that the courts must decide on a case by case basis what is actionable as fraud in a case in which a prospective purchaser alleges that the vendor has falsely represented that an offer has been made by a second prospective purchaser which the vendor will accept if the first prospective purchaser does not agree to the asking price and that liability is made to depend on the degree of thoroughness to which fraud is perpetrated.²

Some courts have held, however, that the general rule applicable to representations as to value applies, and that a misrepresentation that a certain sum has been bid by another for the property does not constitute actionable fraud.³ Additionally, a party cannot recover on a claim of fraudulent inducement or misrepresentation based on any alleged statements to the effect that a company's offer is a final, best, or nonnegotiable offer.⁴

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Footnotes

- 1 [Kabatchnick v. Hanover-Elm Bldg. Corp.](#), 328 Mass. 341, 103 N.E.2d 692, 30 A.L.R.2d 918 (1952); [Elias v. Handler](#), 155 A.D.2d 583, 548 N.Y.S.2d 33 (2d Dep't 1989) (rescission of sale).
- 2 [Ravosa v. Zais](#), 40 Mass. App. Ct. 47, 661 N.E.2d 111 (1996).
- 3 [Ripy v. Cronan](#), 131 Ky. 631, 115 S.W. 791 (1909); [Shikes v. Gabelnick](#), 273 Mass. 201, 173 N.E. 495, 87 A.L.R. 1339 (1930) (prospective contract of exchange).
- 4 [Marburger v. Seminole Pipeline Co.](#), 957 S.W.2d 82 (Tex. App. Houston 14th Dist. 1997) (disapproved of on other grounds by, [Hubenak v. San Jacinto Gas Transmission Co.](#), 141 S.W.3d 172 (Tex. 2004)).

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§ 179. Sale price of other property in neighborhood

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

As a general rule, false statements made by an owner or the owner's agent in connection with a transaction concerning real property, as to the price for which other property in the neighborhood has sold, where made as a statement of fact and justly relied upon by the representee to the representee's injury, constitute misrepresentation of a material fact, amounting to fraud, which entitles the representee to appropriate relief.¹ This rule has been applied to such false statements made by a vendor or the vendor's agent,² and by an exchanger of property.³ Statements concerning the sale price of other land in a neighborhood, however, may be made in such a manner and under such conditions as to amount only to the expression of an opinion, and such statements by one engaged in acquiring real estate have been regarded as nonactionable "sales talk."⁴

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Footnotes

- 1 [Winkler v. Jerrue](#), 20 Cal. App. 555, 129 P. 804 (2d Dist. 1912); [Brody v. Foster](#), 134 Minn. 91, 158 N.W. 824 (1916).
- 2 [Winkler v. Jerrue](#), 20 Cal. App. 555, 129 P. 804 (2d Dist. 1912).
- 3 [Oulton v. McManus](#), 173 N.W. 14 (Iowa 1919); [Brody v. Foster](#), 134 Minn. 91, 158 N.W. 824 (1916).
- 4 [Glass v. City of Binghamton](#), 6 A.D.2d 944, 176 N.Y.S.2d 18 (3d Dep't 1958).

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c. Income, Profits, or Rental Productivity

§ 180. Generally

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West's Key Number Digest, [Fraud](#) , 27, 28

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 115](#) (Complaint, petition, or declaration—For damages—Fraud in sale of business—Misrepresentation as to past profits)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 116](#) (Complaint, petition, or declaration—For rescission—Fraud in sale of business combined with lease of business—Misrepresentation as to past profits and value of business inventory)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 117](#) (Complaint, petition, or declaration—For rescission—Fraud in sale of dry cleaning business—Misrepresentation as to income, expenses, and lack of competing business)

Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 174, 177, 178 (Complaint, petition, or declaration for fraud in sale of land by representations as to rental income)

A false representation as to past or present rents, profits, or income has often been held to constitute a sufficient basis for an action for damages or rescission on the ground of fraud.¹ Thus, a false representation by an owner of land, or the owner's agent, seeking to dispose of the property commercially, as to the present or past income,² profits, or produce³ thereof, or as to the amount of rent received therefor,⁴ is regarded as a statement of fact upon which fraud may be predicated if it is false since these are matters within the representor's own knowledge. The same is true of a false assertion that the profits of a business are or have been a certain sum annually,⁵ or a false statement as to what a business now earns⁶ or its gross receipts.⁷ Thus, false representations concerning the past "volume of business" or "gross income from sales" or gross rents may constitute fraud.⁸

While in most instances a statement as to the amount of past or present rents, profits, or income, made in the form of a statement of fact, is treated as one of fact and not of opinion,⁹ where a statement concerning rents, profits, or income is understood to be merely an estimate or opinion, the courts will treat it as such even though the substance of the statement could have been embodied in a statement of fact,¹⁰ particularly where a buyer rushes into the sales transaction without insisting upon or awaiting receipt of any more definitive financial information.¹¹ However, a vague statement that a property or business is "profitable," or a "money-maker," or the like, may sometimes be treated as one of fact.¹²

In cases involving false representations as to rents, profits, or income, the question whether there is actionable fraud is determined with respect to the intelligence and experience of the victim of the fraud, rather than by what the effect would have been on the average person.¹³ This is a test that works both ways. For example, if the person complaining of fraud is one who has great experience in the field of business in which the transaction occurred, the court may find that the person was not in fact deceived by the false statement but decided to enter into the contract because the person believed that the consideration was proper even though the income, rents, or profits were less than represented, but the average person would have had a cause of action for fraud.¹⁴

Fraud may sometimes consist of understating, rather than overstating, income, rents, or profits, as where the representor is required to make a payment in proportion to the amount of the representor's income, rents, or profits, and the representor understates them to cut down the amount of his or her payment.¹⁵

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Footnotes

- 1 [Hegg v. Dickens](#), 270 Ark. 641, 606 S.W.2d 106 (Ct. App. 1980); [Head v. Benjamin Rich Realty Co.](#), 55 Mich. App. 348, 222 N.W.2d 237 (1974); [Hampton v. Sabin](#), 49 Or. App. 1041, 621 P.2d 1202 (1980).
In exchange transactions, fraud may be predicated on false representations concerning the past or present income, rentals, or profits of the property exchanged. [Pustelniak v. Vilimas](#), 352 Ill. 270, 185 N.E. 611 (1933); [Rudnick v. Rudnick](#), 281 Mass. 205, 183 N.E. 348 (1932).
- 2 [Hegg v. Dickens](#), 270 Ark. 641, 606 S.W.2d 106 (Ct. App. 1980); [Saba v. Miller](#), 327 Mich. 363, 41 N.W.2d 894 (1950); [Bertram v. Kempster](#), 216 S.W.2d 494 (Mo. 1949).
- 3 [Miller v. Porter](#), 218 Ark. 841, 238 S.W.2d 940 (1951); [Eck v. McMichael](#), 176 Cal. App. 2d 368, 1 Cal. Rptr. 369 (4th Dist. 1959).

- 4 Kackley v. Webber, 310 Ky. 285, 220 S.W.2d 587, 9 A.L.R.2d 500 (1949); Kabatchnick v. Hanover-Elm
Bldg. Corp., 328 Mass. 341, 103 N.E.2d 692, 30 A.L.R.2d 918 (1952).
An investigation is not necessary where a specific false statement as to rents is reasonably relied upon and
knowingly made. Upledger v. Vilanor Inc., 369 So. 2d 427 (Fla. 2d DCA 1979).
- 5 Hegg v. Dickens, 270 Ark. 641, 606 S.W.2d 106 (Ct. App. 1980); Furtado v. Gemmell, 242 Or. 177, 408
P.2d 733 (1965).
- 6 Miller v. Porter, 218 Ark. 841, 238 S.W.2d 940 (1951); Hawthorn-Mellody, Inc. v. Driessen, 213 Kan. 791,
518 P.2d 446 (1974).
- 7 Miller v. Porter, 218 Ark. 841, 238 S.W.2d 940 (1951) (dairy herd).
- 8 Automobile Ins. Co. of Hartford, Conn. v. Barnes-Manley Wet Wash Laundry Co., 168 F.2d 381 (C.C.A.
10th Cir. 1948); Horner v. Wagdy, 173 Or. 441, 146 P.2d 92 (1944).
- 9 Spiess v. Brandt, 230 Minn. 246, 41 N.W.2d 561, 27 A.L.R.2d 1 (1950).
- 10 Carlson v. Brickman, 110 Cal. App. 2d 237, 242 P.2d 94 (1st Dist. 1952); Miller v. Protrka, 193 Or. 585,
238 P.2d 753 (1951).
- 11 In re Wright, 223 B.R. 886 (Bankr. E.D. Pa. 1998) (applying Pennsylvania law).
- 12 Spiess v. Brandt, 230 Minn. 246, 41 N.W.2d 561, 27 A.L.R.2d 1 (1950).
- 13 Hefferan v. Freebairn, 34 Cal. 2d 715, 214 P.2d 386 (1950); Bertram v. Kempster, 216 S.W.2d 494 (Mo.
1949).
- 14 King v. Miller, 97 Cal. App. 2d 702, 218 P.2d 554 (1st Dist. 1950); Fote v. Reitano, 46 So. 2d 891 (Fla. 1950).
- 15 Automobile Ins. Co. of Hartford, Conn. v. Barnes-Manley Wet Wash Laundry Co., 168 F.2d 381 (C.C.A.
10th Cir. 1948); Gregory v. Chemical Waste Management, Inc., 38 F. Supp. 2d 598 (W.D. Tenn. 1996)
(applying Alabama law).

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37 Am. Jur. 2d Fraud and Deceit § 181

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IV. False Representations

G. Representations and Statements as to Particular Matters

3. Value, Cost, and Income of Property

c. Income, Profits, or Rental Productivity

§ 181. As to future income, profits, rents, etc

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

Predictions of future profits are not ordinarily fraudulent where the parties deal at arm's length.¹ A statement concerning future profits, income, or rents is generally a mere prediction or "opinion" and not a statement of fact, and cannot constitute actionable fraud.² Where a statement concerning future profits is justified by past experience and present knowledge, it is not fraudulent,³ and the mere fact that a promise or prediction concerning future rents, profits, or income was not fulfilled does not establish a liability for fraud.⁴

Statements that "business is good" and the "plaintiff will get rich," that "business is excellent and the plaintiff should buy it," that it is "a gold mine," and that a third party is going to buy the business are not factual and do not relate to past or existing fact and can not form the basis of an action in fraud.⁵

On the other hand, false representations of future profits of a business may be so gross as to constitute fraud, especially where the representor is experienced and has superior knowledge of the business and the representee is inexperienced and ignorant

of the facts and prospects respecting such business.⁶ Moreover, misrepresentation as to the profits that may be derived from a business will amount to a misstatement of fact if the person making it has no reasonable grounds on which to base it and has no honest belief in its truth but makes the statement merely for the purpose of misleading and defrauding the other party as where a business sold is being conducted at a loss, and the positive assertion is made by the seller to the purchaser, to induce the purchase, that the latter will receive large profits therefrom.⁷

Where one states that the future profits or income should be a certain sum, but the person actually believes that there will be no profits or income or that they will be substantially less than the person represents, the statement constitutes actionable fraud where the hearer believes the representor and relies on the statement to his or her injury.⁸ The rule that a false promise may be the basis of actionable fraud where at the time it was made the promisor did not intend to perform it⁹ has been applied where the promise was as to rents, profits, or income¹⁰ although in some cases, it has been held that a promise to guarantee a certain future income is not actionable fraud even though the defendant intended not to perform the promise when the defendant made it.¹¹

Where the subject of the sale is a new business so that there are few existing facts concerning its profits or prospects, the future is unusually speculative, and it may be held that representations concerning future profits involve too much guesswork to constitute actionable fraud.¹² Even where the structure or business is well established, but a variety of factors that the owner cannot control seems likely to affect future profits or income, the courts may well hold that a false statement concerning future profits or income does not constitute fraud.¹³

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Footnotes

- 1 Pustelniak v. Vilimas, 352 Ill. 270, 185 N.E. 611 (1933).
- 2 Fischer v. Division West Chinchilla Ranch, 310 F. Supp. 424 (D. Minn. 1970); Stumpf v. Lawrence, 4 Cal. App. 2d 373, 40 P.2d 920 (3d Dist. 1935); Canterbury Court, Inc. v. Rosenberg, 224 Kan. 493, 582 P.2d 261 (1978); Beierle v. Taylor, 164 Mont. 436, 524 P.2d 783 (1974); Guadalupe-Blanco River Authority v. City of San Antonio, 145 Tex. 611, 200 S.W.2d 989 (1947).
- 3 Donnelly v. Baltimore Trust & Guarantee Co., 102 Md. 1, 61 A. 301 (1905).
- 4 Rogers v. Sinclair Refining Co., 49 Ga. App. 72, 174 S.E. 207 (1934).
- 5 Davidowitz v. Dixie Associates, 76 Misc. 2d 554, 351 N.Y.S.2d 34 (Sup 1973), judgment modified on other grounds, 44 A.D.2d 535, 353 N.Y.S.2d 447 (1st Dep't 1974).
Where a vendor's assertion that a campsite operation was a "gold mine" merely constituted "dealer's talk" and where the vendor's statement that gross revenues from the campground in a certain summer season had amounted to \$1,500 was not false, a jury properly returned a verdict for the vendors for overdue installments on the purchase price and against the vendees on a counterclaim for recession of the sale, notwithstanding the vendees only grossed \$400 for the summer following the purchase of the property. *Eaton v. Sontag*, 387 A.2d 33 (Me. 1978).
- 6 Wilke v. Coinway, Inc., 257 Cal. App. 2d 126, 64 Cal. Rptr. 845 (1st Dist. 1967); Hollerman v. F. H. Peavey & Co., 269 Minn. 221, 130 N.W.2d 534 (1964); Bails v. Wheeler, 171 Mont. 524, 559 P.2d 1180 (1977).
- 7 Luchow v. Kansas City Breweries Co., 183 S.W. 1123 (Mo. Ct. App. 1916); Starnes v. Motsinger, 278 S.W. 496 (Tex. Civ. App. El Paso 1925) (recognizing rule).
- 8 Dyke v. Zaiser, 80 Cal. App. 2d 639, 182 P.2d 344 (4th Dist. 1947); Russell v. Industrial Transp. Co., 113 Tex. 441, 251 S.W. 1034, 51 A.L.R. 1 (Comm'n App. 1923), *aff'd*, 113 Tex. 441, 258 S.W. 462, 51 A.L.R. 1 (1924).
- 9 §§ 94 to 100.
- 10 Kentucky Electric Development Co.'s Receiver v. Head, 252 Ky. 656, 68 S.W.2d 1 (1934); Murph v. Foxworth, 93 S.W.2d 817 (Tex. Civ. App. Galveston 1936).
- 11 Hart v. Zaitz, 72 Colo. 315, 211 P. 391 (1922); Shine v. Dodge, 130 Me. 440, 157 A. 318 (1931).

- 12 Coleman v. Dawson, 110 Cal. App. 201, 294 P. 13 (3d Dist. 1930); Detroit & Security Trust Co. v. Echternkamp, 254 Mich. 369, 237 N.W. 52 (1931).
- 13 Moser v. New York Life Ins. Co., 151 F.2d 396 (C.C.A. 9th Cir. 1945); Gibson v. Mendenhall, 1950 OK 276, 203 Okla. 558, 224 P.2d 251 (1950).

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37 Am. Jur. 2d Fraud and Deceit § 182

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§ 182. As to future income, profits, rents, etc—Future dividends

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  [27](#), [28](#)

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

Forms

[Am. Jur. Pleading and Practice Forms, Corporations § 133](#) (Complaint, petition, or declaration—For damages—Misrepresentations in prospectus—Promoter's guaranty of minimum annual dividend on stock subscription)

Fraud may be predicated on certain representations concerning future dividends.¹ On the other hand, it has been held that a false statement concerning future dividends is a mere prediction or opinion rather than a statement of fact and is not ordinarily actionable.²

While the rule that fraud may consist of a promise made with intent not to perform it has been applied where the defendant promised that certain dividends would be paid in the future,³ promises as to future dividends have also been held to be nonactionable opinions or promises.⁴

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Footnotes

- 1 State Building & Loan Ass'n v. Bradwell, 227 Ala. 606, 151 So. 689 (1933); Kentucky Electric Development Co.'s Receiver v. Head, 252 Ky. 656, 68 S.W.2d 1 (1934); Seaboard Planning Corp. v. Powell, 364 So. 2d 1091 (Miss. 1978) (guaranteed return of 8% per annum).
- 2 Farmers' Loan & Mortgage Co. v. Langley, 166 La. 251, 117 So. 137 (1928); Howard v. Merrick, 145 Or. 573, 27 P.2d 891 (1933).
- 3 Kentucky Electric Development Co.'s Receiver v. Head, 252 Ky. 656, 68 S.W.2d 1 (1934).
- 4 Steele v. Singletary, 120 S.C. 132, 110 S.E. 833 (1922).

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3. Value, Cost, and Income of Property

c. Income, Profits, or Rental Productivity

§ 183. As to future income, profits, rents, etc—"Rental value"

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

Where a statement as to "rental value" is made and accepted as one of present fact, it will be thus treated in the law,¹ although it has been held that a statement as to how much a purchaser can get as rents for, or the "rental value" of, the property is a statement of opinion which, even though untrue, is not actionable.² Further, purchasers may bring a fraud action where rent concessions are misrepresented.³

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Footnotes

¹ [Cahill v. Readon](#), 85 Colo. 9, 273 P. 653 (1928); [Wilson v. Robinson](#), 21 N.M. 422, 155 P. 732 (1916).

² [Savinovich v. Winbigler](#), 155 Wash. 333, 284 P. 77 (1930).

Statements made by a vendor's agent concerning the future rentals of apartment houses were not misrepresentations where the agents also stated to the vendee that the buildings would be an excellent

investment "if you receive the rents as we contemplate ..." [Pacesetter Homes, Inc. v. Brodtkin](#), 5 Cal. App. 3d 206, 85 Cal. Rptr. 39 (2d Dist. 1970).
3 [Kelley/Lehr & Associates, Inc. v. O'Brien](#), 194 Ill. App. 3d 380, 141 Ill. Dec. 426, 551 N.E.2d 419 (2d Dist. 1990).

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Financial status is a fact, and a statement as to that status affirms a fact notwithstanding that it represents a conclusion based on the valuation of property.¹ Where one has been induced to enter into an agreement concerning an interest in land by fraudulent misrepresentations as to the financial ability of a party, the circumstances may amount to fraud.² Likewise, where one is given a statement of assets and liabilities as it appears on the books of a business which the person contemplates purchasing, that person has the right to assume, if nothing is said to the contrary, that it is a truthful statement of the affairs of the business and that all the assets and liabilities are on the books and are correctly set forth.³ A seller of a business who tells the buyer that only one or two accounts were leaving or giving notice to leave, when the seller has knowledge to the contrary, can be held liable to the buyer, under the rule that a seller who misrepresents a material fact knowing that it is untrue and that the buyer will rely thereon can be held responsible for the seller's misdeeds.⁴

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Footnotes

- ¹ [Gainesville Nat. Bank v. Bamberger](#), 77 Tex. 48, 13 S.W. 959 (1890).
- ² [Newman v. Newman](#), 103 Ohio St. 230, 103 Ohio St. 267, 133 N.E. 70, 18 A.L.R. 1089 (1921).
- ³ [Foote v. Leary](#), 103 A.D. 547, 93 N.Y.S. 169 (1st Dep't 1905).
- ⁴ [Aleppo Corp. v. Pozin](#), 114 So. 2d 645 (Fla. 3d DCA 1959).

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The rule is well established that false representations, factual in nature and made by a person concerning the person's own credit, solvency, or financial position or ability, constitute the basis for a charge of fraud,¹ at least when they are relied upon by the party or parties to whom they are made.² Such representations constitute a fraud that will either sustain an action of deceit³ or be grounds for rescinding a commercial transaction made in reliance thereon⁴ although more than a mere overestimate of the value of the representor's property by a representor is necessary before the representor can be held guilty of fraud in contracting a debt.⁵

In many cases, false representations by borrowers that are made in financial statements submitted as the basis for loans or extensions of credit constitute actionable fraud.⁶ Actions for fraudulent representations in such financial statements must be predicated upon those representations which are material in nature and form an inducement to the transaction.⁷ Materiality may be a question of law or fact but must embrace a subject relating to the borrower's financial condition that constituted a moving factor resulting in the action of the lender.⁸

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¹ [Monier v. Guaranty Trust Co. of New York](#), 82 F.2d 252, 104 A.L.R. 912 (C.C.A. 2d Cir. 1936); [Manly v. Ohio Shoe Co.](#), 25 F.2d 384, 59 A.L.R. 413 (C.C.A. 4th Cir. 1928); [Bicknell v. Stanley](#), 118 B.R. 652 (S.D. Ind. 1990) (applying Indiana law).

The rule is applicable where the performance of services is secured by the false representation as to financial responsibility. [Hunt v. Lewis](#), 87 Vt. 528, 90 A. 578 (1914).

- 2 Paron Capital Management, LLC v. Crombie, 2012 WL 2045857 (Del. Ch. 2012).
3 Henry v. Dennis, 95 Me. 24, 49 A. 58 (1901).
4 Monier v. Guaranty Trust Co. of New York, 82 F.2d 252, 104 A.L.R. 912 (C.C.A. 2d Cir. 1936); In re
Weissman, 19 F.2d 769, 53 A.L.R. 644 (C.C.A. 2d Cir. 1927); Manly v. Ohio Shoe Co., 25 F.2d 384, 59
A.L.R. 413 (C.C.A. 4th Cir. 1928).
5 South Branch Lumber Co. v. Ott, 142 U.S. 622, 12 S. Ct. 318, 35 L. Ed. 1136 (1892).
6 Hinton v. Equitable Loan Co., 41 Ga. App. 815, 155 S.E. 101 (1930); First State Sav. Bank of Muskegon
Heights v. Dake, 250 Mich. 525, 231 N.W. 135 (1930).
7 Hills Sav. Bank v. Cress, 205 Iowa 306, 218 N.W. 74 (1928).
8 Hills Sav. Bank v. Cress, 205 Iowa 306, 218 N.W. 74 (1928); First State Sav. Bank of Muskegon Heights
v. Dake, 250 Mich. 525, 231 N.W. 135 (1930).

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§ 186. Representations as to one's own financial status—By purchaser

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West's Key Number Digest, [Fraud](#) , 27, 28

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 124](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to own financial standing—General form)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 125](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to own financial standing—Made through merchants' credit association)

If a buyer knowingly misrepresents the buyer's financial condition and thus induces the seller to sell the buyer goods on credit, the seller may rescind the sale and recover the goods sold.¹

If the transactions attacked as fraudulent consist of a number of independent sales extending over a considerable time, and not a single transaction, application of the general principles must be applied to each transaction to obtain a proper result as there may be fraud justifying a rescission in one and not in another.²

A misrepresentation by the purchaser in a land contract as to the purchaser's financial responsibility may be ground for rescission by the seller where the contract provides for payment of the purchase price in future installments.³

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Footnotes

- 1 [Browning v. De Ford](#), 178 U.S. 196, 20 S. Ct. 876, 44 L. Ed. 1033 (1900); [McGregor v. Battle](#), 128 Ga. 577, 58 S.E. 28 (1907); [John Silvey & Co. v. Tift](#), 123 Ga. 804, 51 S.E. 748 (1905).
- 2 [Pelham v. Chattahoochee Grocery Co.](#), 146 Ala. 216, 41 So. 12 (1906).
- 3 [Olson v. Pettibone](#), 168 Minn. 414, 210 N.W. 149, 48 A.L.R. 913 (1926).

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 46](#) (Complaint, petition, or declaration—For damages—Conspiracy by bank and automobile dealer to misrepresent automobile dealer's true financial condition to finance company)
[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 126 to 128](#) (Complaint, petition, or declaration—For damages—Misrepresentations as to solvency of third person—Inducing sale of goods to third person)

It is well settled that where the other requisite elements of actionable fraud are present, false and fraudulent representations made to one contemplating business transactions or negotiations with a third person, concerning the financial status, solvency, or credit of such third person, constitute misrepresentations which may form the basis for actionable fraud.¹ Recovery may

be had for misrepresentation as to a third party's financial condition where a person for the purpose of inducing another to lend money to said third party misrepresents the financial responsibility or solvency of such third person.² Further, when one undertakes to answer a financial inquiry regarding a third party and there is no fiduciary or contractual relationship between the party inquiring and the party being inquired of, the party being inquired of is under a duty to answer truthfully.³ Generally, where a bank has given an honest opinion as to the financial worth and standing of a third person and as to whether the third person is entitled to credit, based on information known to the bank, the mere fact that the bank was mistaken in its opinion will not make it liable for fraud and deceit.⁴

Benefit to the representor is entirely immaterial as far as the representor's responsibility is concerned.⁵ In order to constitute the basis of a charge of fraud in any case, however, the statements must be reasonably certain and definite⁶ although under certain circumstances they may be implied.⁷ They must be more than mere expressions of opinion⁸ or statements as to something to eventuate in the future,⁹ and according to the language of many of the authorities, they must be false and fraudulent in that they were made with intent to deceive or so recklessly as to constitute the equivalent of wrongful knowledge.¹⁰ Statements as to the credit and financial standing of third persons are often largely matters of opinion¹¹ and are so understood,¹² and when such is the case, they are not actionable¹³ provided that they are honestly given.¹⁴

False representations regarding the financial condition of a third person made after credit has been extended to the person are not actionable, at least where it is not shown that subsequently to the making of the false representations, the representee acted to the representee's detriment, refrained from asserting some right, or changed the representee's position by reason of such representations.¹⁵

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Footnotes

- 1 [Isaigi v. Brown](#), 58 U.S. 183, 17 How. 183, 15 L. Ed. 208, 1854 WL 7486 (1854); [Lehigh Valley Trust Co. v. Central Nat. Bank of Jacksonville](#), 409 F.2d 989 (5th Cir. 1969); [Forbes v. Auerbach](#), 56 So. 2d 895, 32 A.L.R.2d 176 (Fla. 1952); [Nailor v. Western Mortg. Co.](#), 54 Wash. 2d 151, 338 P.2d 737, 72 A.L.R.2d 938 (1959); [First Nat. Bank in Oshkosh v. Scieszinski](#), 25 Wis. 2d 569, 131 N.W.2d 308 (1964).
As to the liability of a mercantile credit reporting agency for negligence, or negligence amounting to fraud, see [Am. Jur. 2d, Collection and Credit Agencies](#) §§ 39, 40.
- 2 [Community Bank, Lake Oswego, Oregon v. Bank of Hallandale & Trust Co.](#), 482 F.2d 1124 (5th Cir. 1973).
- 3 [Metal Trading Services of Colorado, Inc. v. Trans-World Services, Inc.](#), 781 F. Supp. 1539 (D. Kan. 1991) (applying Kansas law).
- 4 [Circle 76 Fertilizer, Inc. v. Nelsen](#), 219 Neb. 661, 365 N.W.2d 460, 41 U.C.C. Rep. Serv. 1079 (1985).
- 5 § 33.
- 6 [Pain v. Kiel](#), 288 F. 527 (C.C.A. 8th Cir. 1923); [Lillian Knitting Mills Co. v. Earle](#), 237 N.C. 97, 74 S.E.2d 351 (1953).
A general statement or report stating conclusions as to the financial standing of a third person which is made the basis of credit to that person is not generally actionable. [Yates Center Nat. Bank v. Allen](#), 92 Kan. 481, 141 P. 553 (1914).
- 7 [Eastern Trust & Banking Co. v. Cunningham](#), 103 Me. 455, 70 A. 17 (1908).
- 8 [Lord v. Goddard](#), 54 U.S. 198, 13 How. 198, 14 L. Ed. 111, 1851 WL 6691 (1851); [Yates Center Nat. Bank v. Allen](#), 92 Kan. 481, 141 P. 553 (1914).
- 9 [Taylor v. Commercial Bank](#), 174 N.Y. 181, 66 N.E. 726 (1903).
- 10 § 127.
- 11 [Murray v. Lamb](#), 174 Or. 239, 148 P.2d 797 (1944).
- 12 [Russell v. Clark's Ex'rs](#), 11 U.S. 69, 3 L. Ed. 271, 1812 WL 1519 (1812).

- 13 Gleason v. Thaw, 234 F. 570 (C.C.A. 2d Cir. 1916); Yates Center Nat. Bank v. Allen, 92 Kan. 481, 141 P. 553 (1914); Simons v. Cissna, 52 Wash. 115, 100 P. 200 (1909).
- 14 § 127.
- 15 Todd v. Wichita Federal Sav. and Loan Ass'n, 184 Kan. 492, 337 P.2d 648 (1959).

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§ 188. Representations as to third person's financial status—Necessity of indicating extent of credit

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

It has been held that a general representation as to the solvency or credit of a third person is not actionable where there is no indication in the representation itself or in the circumstances as to the extent to which the credit may safely go.¹ There is also authority, however, that a representation as to a third person's financial status is actionable even though there was no limitation in the representation on the amount of credit that should be given.²

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Footnotes

¹ [James v. Crosthwait](#), 97 Ga. 673, 25 S.E. 754 (1896).

² [Simons v. Cissna](#), 52 Wash. 115, 100 P. 200 (1909) (representation that a corporation was solvent).

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§ 189. Representations as to third person's financial status—Use of particular terms

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Just what may be said to have been fairly indicated by the use of such general terms as "good," "responsible," or "solvent," with reference to the financial condition or credit of another, has been variously interpreted by the courts.¹ A statement that a person is solvent is held to be a representation of fact,² and a representation that a third person is "good" for credit has been held to be factual and actionable.³

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Footnotes

¹ [Farmers' Sav. Bank of Morrison v. Jameson](#), 175 Iowa 676, 157 N.W. 460 (1916).

² [Simons v. Cissna](#), 52 Wash. 115, 100 P. 200 (1909).

³ [Redfern v. Cornell](#), 6 A.D. 436, 39 N.Y.S. 656 (1st Dep't 1896).

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§ 190. Representations as to credit or financial condition of firm, corporation, or association

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 36](#) (Complaint, petition, or declaration—For damages—Intentional misrepresentation of true financial condition of corporation to which plaintiff had extended credit)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 139](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to solvency of defendant's company—Plaintiff induced to discount notes on company's endorsement and guarantee)

The rule that a false representation regarding the credit, solvency, or financial condition of a third person is actionable¹ applies with particular force where a person makes false representations as to the financial status of the person's own firm.² The rule also

applies where the representations are made concerning another firm, especially where they are based on inadequate investigation and information.³ It has been stated, however, that a representation as to the credit condition of a company is an opinion and is not actionable.⁴

False representations as to the financial condition or solvency of a corporation may constitute the basis of an action in fraud against anyone making such representations.⁵ Misrepresentations of officers, directors, and stockholders of corporations as to the financial condition of such corporations are actionable by third persons who, in reliance on such representations, deal with or extend credit to the corporation and incur losses thereby.⁶ Similarly, representations by partners concerning the financial condition of the partnership may be actionable.⁷ A representation by members of an association that there are sufficient funds in the possession of the association to pay fully in cash all persons performing work in the erection of a building for the association is not promissory in character, but has a direct relation to an existing state of facts, and is therefore actionable where it is false.⁸

Where a corporate director or officer makes assurances of the payment of overdrafts and checks, while knowing the corporation is insolvent, there is no fraud as there has been no misrepresentation of the corporation's financial condition absent some disclosure regarding the financial condition of the corporation.⁹

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Footnotes

- 1 § 187.
- 2 *Tindle v. Birkett*, 171 N.Y. 520, 64 N.E. 210 (1902).
A blanket assertion of reliance on oral representations about a company are insufficient where the party making such allegation is unable to recall the content of these oral representations. *Vreeken v. Lockwood Engineering, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009).
The principal of a debtor corporation did not knowingly misstate or omit a material fact with the intention of inducing the creditor's reliance on the misstatement, which caused it to reasonably rely on that misrepresentation, where the creditor knew that the debtor was in financial distress when he requested additional credit, he made the request as part of a good faith effort to cure the debtor's default, and he never intended to fail to repay the debtor's creditors. *Dowlings, Inc. v. Homestead Dairies, Inc.*, 88 A.D.3d 1226, 932 N.Y.S.2d 192 (3d Dep't 2011).
- 3 *Duncan v. Stoneham*, 253 N.Y. 183, 170 N.E. 571 (1930).
- 4 *Evans v. Gray*, 215 So. 2d 40 (Fla. 3d DCA 1968).
- 5 *Kirby v. Davis*, 91 S.W.2d 215 (Mo. Ct. App. 1936); *Dash v. Jennings*, 272 A.D. 1073, 74 N.Y.S.2d 881 (2d Dep't 1947).
- 6 *Link v. Cox*, 529 S.W.2d 189 (Mo. Ct. App. 1975).
- 7 *Dolce v. Dolce*, 108 Ill. App. 3d 817, 64 Ill. Dec. 363, 439 N.E.2d 1028 (1st Dist. 1982).
- 8 *Samuel W. Hurowitz, Inc., v. Selkin*, 241 A.D. 269, 271 N.Y.S. 576 (1st Dep't 1934).
- 9 *Marine Midland Bank v. Meehan's Exp., Inc.*, 72 A.D.2d 624, 420 N.Y.S.2d 788 (3d Dep't 1979).

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§ 191. Representations as to credit or financial condition of firm, corporation, or association—Respecting transactions in corporation's securities

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Forms

[Am. Jur. Pleading and Practice Forms, Corporations § 133](#) (Complaint, petition, or declaration—For damages—Misrepresentations in prospectus—Promoter's guaranty of minimum annual dividend on stock subscription)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 135 to 138](#) (Complaint in federal court—For damages—Purchase of stock induced by misrepresentation)

It is frequently held that representations as to the value and desirability of corporate securities, such as stocks and bonds, made to induce a commercial transaction therein, are actionable fraud where false, and where definite statements and particular facts as to the financial condition, assets, and status of the corporation have been asserted,¹ especially where the parties have not had equal knowledge or means of knowledge of the subject.² A mere expression of opinion, however, as to the worth of a corporation or the value of its securities, or, what they will be worth in the future, in the absence of any particular statements or special circumstances affecting the relationship of the parties, will not be regarded as actionable.³

Misrepresentations as to the financial condition of a corporation contained in reports of directors,⁴ or of a proposed corporation contained in a prospectus,⁵ may constitute fraud where one is induced to purchase stock in reliance thereon, the same as false

representations by officers of a bank that induce the making of deposits therein⁶ provided that they are statements of facts and not mere expressions of opinion.⁷

The rule that a misstatement of particular facts affecting the financial worth of a corporation and the attendant value of its securities is actionable has been applied many times to various false representations, and thus, false representations that a corporation has a certain capital or a particular financial standing,⁸ or that a mining company has in its treasury a large sum of money available for the development of a mine or has ore of a certain value in sight,⁹ made by one seeking to dispose of stock, will sustain an action of deceit where the other elements of actionable fraud are present. False representations that a corporation has been properly incorporated, and as to the condition of its business and the value of its stock, have been held to be ground for rescission of a transaction involving such stock.¹⁰ It has also been suggested that fraud might be predicated upon deliberately false statements as to the future listing of stock on an exchange, or the future commencement of operations by a corporation the stock of which was sold.¹¹

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Footnotes

- 1 Blasdel v. Mullenix, 356 F. Supp. 924 (W.D. Okla. 1971); Laney-Payne Farm Loan Co. v. Greenhaw, 177 Ark. 589, 9 S.W.2d 19, 73 A.L.R. 1117 (1928); Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 148 S.E. 785, 73 A.L.R. 1111 (1929).
- 2 Kirby v. Davis, 91 S.W.2d 215 (Mo. Ct. App. 1936); Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 148 S.E. 785, 73 A.L.R. 1111 (1929).
- 3 Deming v. Darling, 148 Mass. 504, 20 N.E. 107 (1889).
- 4 Am. Jur. 2d, Corporations §§ 1636, 1637.
- 5 Am. Jur. 2d, Corporations §§ 522, 523.
- 6 Am. Jur. 2d, Banks and Financial Institutions § 406.
- 7 Bushey v. Coffman, 103 Kan. 209, 173 P. 341 (1918); Redfield v. Lamb, 103 Neb. 410, 172 N.W. 48 (1919).
- 8 Kirby v. Davis, 91 S.W.2d 215 (Mo. Ct. App. 1936).
- 9 Barndt v. Frederick, 78 Wis. 1, 47 N.W. 6 (1890).
- 10 Wagner v. Fehr, 211 Pa. 435, 60 A. 1043 (1905).
- 11 Edward Brockhaus & Co. v. Gilson, 263 Ky. 509, 92 S.W.2d 830 (1936).

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37 Am. Jur. 2d Fraud and Deceit § 192

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Fraud and Deceit

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IV. False Representations

G. Representations and Statements as to Particular Matters

4. Credit, Solvency, and Financial Standing

§ 192. Representations as to checks and notes

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West's Key Number Digest

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 44](#) (Complaint, petition, or declaration—For damages—Fraud in obtaining draft from bank—Purchaser gave bank worthless check)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 201](#) (Answer—Defense—Fraud in obtaining note—Representation that plaintiff was authorized by defendant's creditor to take defendant's note in satisfaction of debt)

The drawing of a check where there are insufficient funds in the bank to pay it is a false representation that the drawer has funds sufficient to meet the check in the hands of the drawee.¹ Knowledge as to the sufficiency of funds on deposit to pay a check will ordinarily be inferred or presumed from the fact of drawing and delivering the check.²

A person who is induced to discount a note and extend credit for the proceeds to the maker-payee in reliance upon false and fraudulent representations as to the maker-payee's financial condition may upon discovery of the fraud rescind the credit so extended, and the amount advanced becomes immediately due and payable and is recoverable or available as an offset.³

False representations that a note⁴ or check⁵ is good, or false representations as to the solvency of the makers⁶ of the notes sold, or that the notes sold⁷ are perfectly good,⁸ or "as good as gold,"⁹ have been held to constitute actionable fraud. Generally, such a statement is regarded as a statement of fact rather than a mere expression of opinion¹⁰ although the form of the statement and the circumstances in which the representation was made may indicate that it was mere opinion and consequently not actionable.¹¹ Some courts thus hold that representations of this type may be either statements of fact or expressions of opinion.¹²

A purchaser of checks, in scanning signatures of sellers' representatives into a computer and electronically "pasting" these signatures on assignment forms which contain numerous warranties to which the sellers have never agreed, and in then affixing these "manufactured" assignments to a complaint which the purchaser serves on the drawer of the checks, in order to make it appear that the purchaser is a holder in due course not subject to various defenses that the drawer might otherwise assert, makes a material misrepresentation of presently existing or past fact, of the kind required to support a common law fraud claim.¹³

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Footnotes

- 1 [Hi-Pro Fish Products, Inc. v. McClure](#), 346 F.2d 497 (8th Cir. 1965); [In re Damiani](#), 157 B.R. 17 (Bankr. N.D. Ohio 1993) (applying Ohio law); [A. Sam & Sons Produce Co. v. Campese](#), 14 A.D.2d 487, 217 N.Y.S.2d 275 (4th Dep't 1961).
- 2 [§ 465](#).
- 3 [Wolf v. National City Bank of New York](#), 170 A.D. 565, 156 N.Y.S. 575 (1st Dep't 1915).
- 4 [Doolen v. Hulsey](#), 192 S.W. 364 (Tex. Civ. App. Amarillo 1917).
- 5 [Sparks v. Guaranty State Bank](#), 179 Kan. 236, 293 P.2d 1017 (1956).
- 6 [Binghamton Trust Co. v. Auten](#), 68 Ark. 299, 57 S.W. 1105 (1900).
A buyer's tender of "insufficient funds" checks constituted a written misrepresentation of the solvency of the buyer. [Amoco Pipeline Co. v. Admiral Crude Oil Corp.](#), 490 F.2d 114, 13 U.C.C. Rep. Serv. 1019 (10th Cir. 1974).
- 7 [Standard Motors Finance Co. v. Mitchell Auto Co.](#), 173 Ark. 875, 293 S.W. 1026, 57 A.L.R. 877 (1927).
- 8 [Crane v. Elder](#), 48 Kan. 259, 29 P. 151 (1892); [Doolen v. Hulsey](#), 192 S.W. 364 (Tex. Civ. App. Amarillo 1917).
A representation that certain notes signed by various persons are "good bankable paper" is a representation of fact. [Engen v. Merchants' & Mfrs.' State Bank](#), 164 Minn. 293, 204 N.W. 963, 43 A.L.R. 610 (1925).
- 9 [Doolen v. Hulsey](#), 192 S.W. 364 (Tex. Civ. App. Amarillo 1917).
- 10 [Crane v. Elder](#), 48 Kan. 259, 29 P. 151 (1892).
- 11 [Andrews v. Jackson](#), 168 Mass. 266, 47 N.E. 412 (1897).
- 12 [Andrews v. Jackson](#), 168 Mass. 266, 47 N.E. 412 (1897).
- 13 [Triffin v. Automatic Data Processing, Inc.](#), 394 N.J. Super. 237, 926 A.2d 362 (App. Div. 2007).

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IV. False Representations

G. Representations and Statements as to Particular Matters

4. Credit, Solvency, and Financial Standing

§ 193. Representations as to obtaining loan, or loan commitment, on property

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[Misrepresentation as to loan commitment on real estate as ground of action, counterclaim, or rescission by vendee, 14 A.L.R.2d 1347](#)

Although, generally, a statement that a loan can be obtained on property amounts to a mere expression of opinion that is not actionable as a fraudulent representation,¹ such a statement may be actionable where it is expressed as a fact.² A distinction has been made between cases in which the vendor of real property falsely represented that a loan commitment of a specified sum had been made on the property, and cases in which the vendor falsely represented that a loan of a specified sum could be obtained thereon, and in the former cases, the false representation is considered material and actionable³ whereas in the latter cases, the false representation is considered promissory in nature and not actionable in the absence of special circumstances.⁴

A bank may be held liable in fraud on account of a failure to make a loan in accordance with an employee's representations where the representation is not one that the loan will be made but that the loan has already been secured.⁵ However, the lender may not be liable where it merely stated that it would consider an application for a new loan.⁶

Footnotes

- 1 Weinstein v. Arlington Oaks, Inc., 286 A.D. 1102, 145 N.Y.S.2d 691 (2d Dep't 1955).
- 2 Shaffer v. Rhyne, 75 S.W.2d 133 (Tex. Civ. App. Waco 1934).
- 3 Gable v. Niles Holding Co., 209 Minn. 445, 296 N.W. 525 (1941); Weinstein v. Arlington Oaks, Inc., 286 A.D. 1102, 145 N.Y.S.2d 691 (2d Dep't 1955).
- 4 Edwards v. French, 304 Mo. 194, 263 S.W. 132 (1924); Hazlett v. Wilkin, 42 Okla. 20, 140 P. 410 (1914).
- 5 Colonial Nat. Bank v. Bredenkamp, 151 Ind. App. 366, 279 N.E.2d 845 (1972).
- 6 Guaranty Bank of Mamou v. Fontenot, 551 So. 2d 804 (La. Ct. App. 3d Cir. 1989).

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